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Northwestern University School of Law

THE FEDERAL REPORTER.

VOL. 23.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

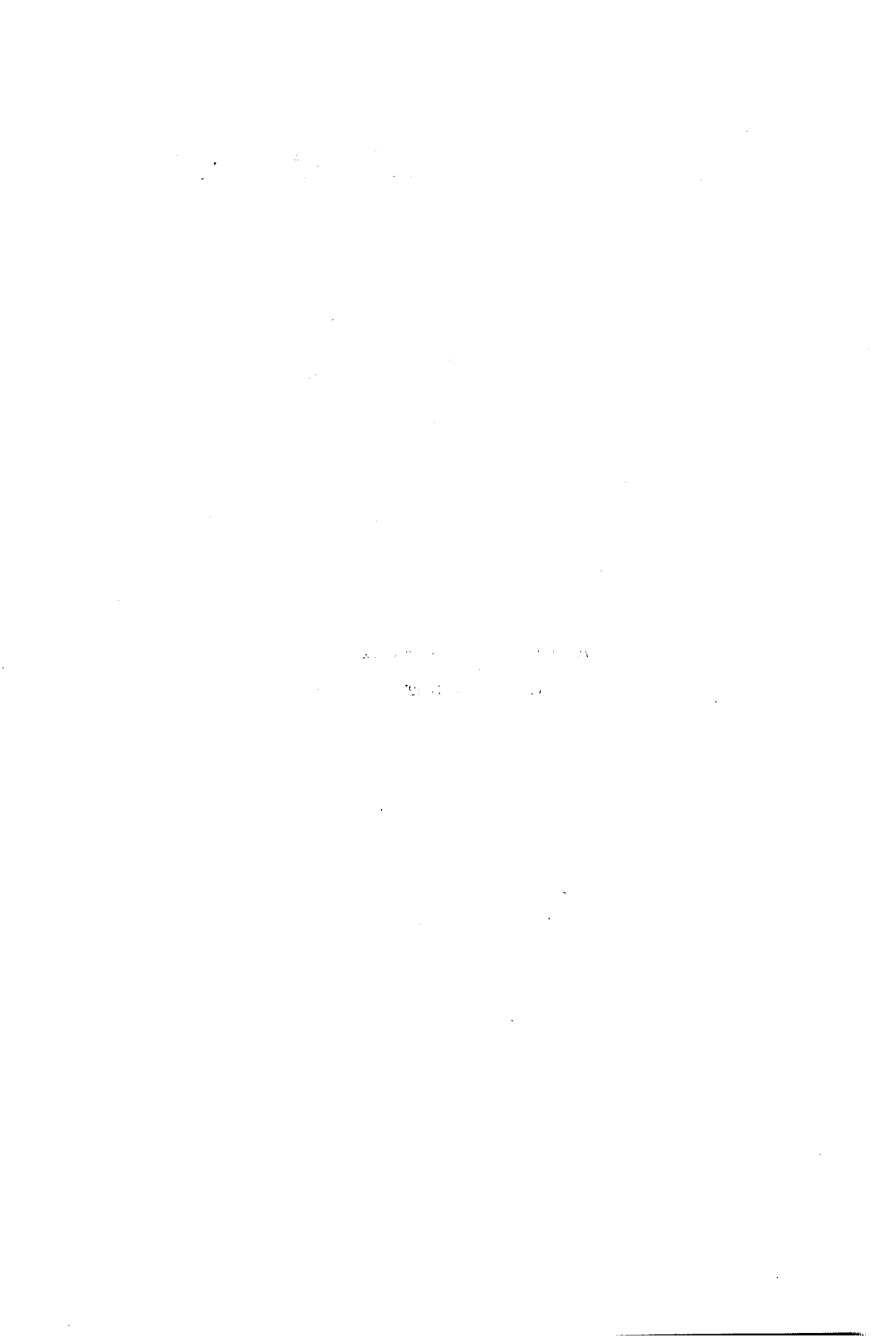
OF THE

UNITED STATES.

MARCH—JUNE, 1885.

ROBERT DESTY, EDITOR.

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JUDGES
OF THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

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ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

HAMMOND *v.* CLEVELAND.

(Circuit Court, D. Oregon. February 25, 1885.)

1. SUIT BY AN ASSIGNEE IN THE NATIONAL COURTS.

The clause in section 1 of the judiciary act of 1875 prohibiting the assignee of a non-negotiable contract from maintaining a suit thereon in the national courts, unless his assignor might have done so, has reference solely to the assignor's right to maintain such suit on account of his citizenship, and not to the amount of the claim or demand arising out of such contract.

2. SAME—MATTER IN DISPUTE THEREIN.

An action may be maintained in the national courts where the sum or value of the matter in dispute, or money sought to be recovered therein, exceeds \$500 in amount, although the complaint contained distinct demands or causes of action of less value than \$500; and it is immaterial whether the plaintiff is the original owner of such demands or acquired them by assignment from such owner.

Action to Recover Money.

Henry Ach, for plaintiff.

O. F. Paxton, for defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to recover the sum of \$3,093.36. The action is brought on three distinct demands or causes of action arising out of contract, which, by section 91 of the Oregon Code of Civil Procedure may be united in one complaint. The first demand is for \$1,136.85, the agreed price of goods sold to the defendant by the plaintiff; the second one is for \$1,648, the agreed price of goods sold to the defendant by the firm of Greenbaum, Sachs & Freeman, citizens of California, and by the latter assigned to the plaintiff; and the third one is for \$308.29, the agreed price of goods sold to the defendant by the firm of Murphy, Grant & Co., citizens of California, and by the latter assigned to the plaintiff; for the aggregate of which sums the plaintiff asks judgment. The defendant demurs to the statement containing the last cause of action, for that

"the court has no jurisdiction of the matter thereof." On the argument of the demurrer, counsel for the defendant cited and relied on the clause of section 1 of the judiciary act of 1875 (18 St. 470) which reads:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant, and bills of exchange."

The exposition of this clause, by counsel for the defendant, is to the effect that, as the assignor could not have maintained a suit on the contract in question to enforce the payment of a sum less than \$500, therefore the plaintiff cannot as assignee thereof. And it must be admitted that the proposition is not without plausibility. But, in construing this restriction on the assignee's right to sue, reference must be had to the manifest aim and object of the provision. The jurisdiction of this court, so far as the same depends on the amount in controversy, is prescribed by an earlier clause in the same section, which in effect limits such jurisdiction to cases where "the matter in dispute" exceeds the sum or value of \$500. But the jurisdiction of the court may also depend on the citizenship of the parties to the suit, and the provision in question is intended to prevent a party to a non-negotiable contract, who cannot, for want of such citizenship, sue his debtor thereon in the national courts, from conferring such right upon a citizen of another state by an assignment of his demand to him. And, so far as this provision is concerned, it matters not what is the sum or value of "the matter in dispute."

The assignor of the contract upon which the third cause of action is founded appears to be a citizen of California. He might, therefore, so far as the question of citizenship is concerned, have prosecuted a suit on such contract in this court, and therefore his assignee may do so. Of course, no one can maintain a suit in this court on this demand alone. The value of it is not sufficient to give the court jurisdiction. But the plaintiff is also the owner of other demands against the defendant,—one in his own right and the other as assignee. As authorized by the Code, (section 91,) he has united these several demands or causes of action in the complaint in this action. And the only other question in the case is, what is the sum or value of "the matter in dispute" in this action? In considering this question, each item or demand in the complaint is not to be taken by itself, as if it were the subject of a separate action, but the sum of these items,—the aggregate value of the three distinct demands contained in the complaint, which constitute the subject of the action, and the amount sought to be recovered by it. The sum which a plaintiff seeks to recover in an action for money is the measure of the value of "the matter in dispute" therein between himself and the defendant. The right of the plaintiff to recover this sum is to be

contested and determined thereby, according to the established mode of procedure; and, so long as it exceeds \$500 in amount, it is immaterial how or whence the plaintiff became the owner of the several items that may constitute or enter into this sum or demand. Indeed, cases may arise in which the assignee of a demand may maintain an action thereon in this court, so far as the value of "the matter in dispute" is concerned, when the assignor could not. For instance, where the demand bears interest, the sum due thereon at the time of the assignment may be less than \$500; but when suit is brought on it by the assignee, the value of it may exceed \$500. Of course, a collusive or pretended assignment of an item in the plaintiff's demand may be set up as a defense to a recovery thereon by the *pseudo* assignee. But when the transaction is *bona fide*, and the legal title is transferred to the assignee, he may maintain an action thereon in this court without reference to its value, provided that the whole sum sought to be recovered therein exceeds \$500, and the citizenship of the assignor and defendant was such at the time of the assignment that a suit might have been maintained between them herein. See *Stanley v. Board of Sup'rs*, 15 FED. REP. 483; *Judson v. Macon Co.* 2 Dill. 213.

The demurrer is overruled.

FITTON and Wife v. PHOENIX ASSUR. Co. and others.

(Circuit Court, D. Vermont. February 10, 1885.)

EQUITY PRACTICE—REFERRING ISSUES OF FACT TO JURY—REV. ST. § 648.

The United States circuit court may send issues of fact, properly raised by the pleadings in an equity case, to a jury for trial.

In Equity.

James L. Martin, for defendants.

Martin H. Goddard, for orators.

WHEELER, J. This cause has been heard before on demurrer to the bill, which was overruled as to the defendants now before the court, with leave to answer over. *Fitton v. Fire Ins. Ass'n*, 20 FED. REP. 766. The defendants have answered that the agreement to bind insurance was procured by fraudulent representations of the orators as to the situation of the property, as to exposure to and precautions against loss from fire; that the loss occurred through want of the precautions represented to be employed, and the wrongful, willful, and negligent acts of the orators. Issues of fact are raised by the traverse of the answers, and the defendants now move that these issues be sent to a jury. The motion is opposed upon the ground that by the statutes of the United States the power to send issues of fact to a jury is

not given to, but rather taken from, the circuit courts as courts of equity, and that these issues should be tried by the court, and not sent to a jury, if the power to send them exists. The provision of the statute chiefly relied upon to show want of such power is that found in section 648, providing that "the trial of issues of fact in the circuit courts shall be by jury, except in cases of equity, and of admiralty and maritime jurisdiction."

It is argued that the exception excludes that mode of trial in the excepted cases. But that is not understood to be the meaning of the provision. The object of it seems to have been to carry out the constitutional provision guarantying the right to trial by jury in common-law cases, and at the same time not to require a trial in that mode in equity and admiralty cases. This provision was enacted in early times, and the power of a circuit court under it to send issues to a jury has always been recognized. *Field v. Holland*, 6 Cranch, 8; *Harding v. Handy*, 11 Wheat. 103; *Brockett v. Brockett*, 3 How. 691. It is expressly stated to exist in *Garsed v. Beall*, 92 U. S. 684. The motion cannot be denied upon that ground. The inconvenience of so sending the issues has been dwelt upon in the argument, but as the trial must be in the same court, with the difference only that it is upon the law side by jury, according to the course of the trial of common-law cases, instead of on the equity side by the judges, according to the ordinary course of equity procedure, that consideration is entitled to but little weight. The principal question is as to the propriety of so sending the issues in this particular case. The issues are the same that they would have been if an insurance in fact by delivery of a policy, instead of a mere agreement to insure, had been effected. The orators have standing in this court merely on account of that difference. The right to trial by jury of an issue of fact proper for their cognizance is valuable as it exists, and is guarantied by the constitutions and laws of this country, notwithstanding the hostility shown to it in some quarters. The defendants have not an absolute right to that mode of trial in this case, because it is not within the constitutional or statutory provisions; but they have the right to have their request for it carefully considered when it falls so naturally in the line of the right in other cases. These issues seem to be very proper for the cognizance of a jury in this case.

Motion granted.

HANNER, Jr., and others v. MOULTON and others.

(Circuit Court, N. D. Texas. January Term, 1885.)

WILL—INTENTION—EXTRINSIC EVIDENCE—LATENT AMBIGUITY.

A will contained the following devise: "I will to J. W. H., Jr., J. P., and J. P., Jr., my tract of land, containing near 1,500 acres first-rate land, lying, I believe, in Ellis county, Texas." At the date of his will, and at the time of his death, the testator was the owner of a head-right certificate for 1,476 acres, but he never owned any land whatever in Ellis county, and he never owned any lands elsewhere in Texas to which the devise applied. *Held*, that parol evidence was not admissible to show that the testator supposed that such certificate had been located in Ellis county, making him the owner of the lands covered thereby, or that it was his intention, as shown by his declarations and conversations, to devise this certificate, if it should turn out that it had not been located, and that he was advised by the attorney who wrote the will that the devise would be effectual to carry out such purpose.

In Equity. Final hearing upon pleadings and evidence.

John L. Henry and John D. Park, for plaintiffs.

Sawnie Robertson, for defendants.

Before WOODS and McCORMICK, JJ.

WOODS, Justice. The bill was filed January 27, 1882, for a decree to establish the title of the plaintiffs to several tracts of land in the state of Texas; one of 586 acres in Ellis county; one of 640 acres in Falls county; and one of 250 acres in Clay county, and to declare that the deeds under which the defendants claimed title to said lands were null and void. The plaintiffs asserted title to the lands, as devisees under the will of James Park, deceased, who died September 4, 1866, at his domicile, in the county of Williamson, in the state of Tennessee. The devise under which the plaintiffs claimed title was in these words:

"I will to John W. Hanner, Jr., James Park, and John Park, Jr., my tract of land, containing near fifteen hundred acres first-rate land, lying, I believe, in Ellis county, Texas. My papers are in the hands of J. A. N. Murray and W. H. Gill, of Clarksville, Texas, who must account for all papers of mine in the hands of Wm. A. Park's widow at his death."

The testator did not, at the date of his will or at his death, own any lands in Ellis county, Texas, nor did he, as the plaintiffs insisted, own any lands in any other county of Texas to which said devise referred. But the testator, at his death, was the owner of a head-right certificate for one-third of a league of land—1,476 acres—issued in the year 1838 by the republic of Texas to one William H. Ewing, which was transferred by Ewing to him by deed dated April 9, 1846. C. R. Johns, one of the defendants, having been, in July, 1867, appointed by the probate court of Travis county, in the state of Texas, administrator, with the will annexed, of the estate of James Park, the testator, by order of the same probate court, sold, at public sale, in April, 1869, for \$110.70, the head-right certificate above mentioned, shown

to be worth about \$200, to J. C. Kerbey, another of the defendants. Kerbey afterwards located the certificate on the several tracts of land in Ellis, Falls, and Clay counties.

The charge of the bill was that all the proceedings of Johns in the probate court of Travis county by which he obtained the order for the sale of the certificate, and the sale itself, were fraudulent; that Kerbey had knowledge of and participated in the fraud; and that the other defendants who were in possession of said lands, claiming title thereto under Kerbey, bought with notice of the fraud. Upon the trial of the case the plaintiffs, conceding that the testator at his death owned no land in Ellis county, or elsewhere in Texas, to which said devise referred, to prevent the devise from being inoperative, and to prove their title to the lands in question, offered evidence tending to show that the testator, when he executed his will, and at the time of his death, believed that the Ewing head-right certificate had been located in Ellis county, making him the owner of the lands covered thereby; that it was the purpose of the testator, shown by his declarations to and conversations with the witnesses, to devise to the plaintiffs the Ewing certificate if it should turn out that it had not been located; and that he was advised by the lawyer who drew his will that the devise above quoted would be effectual to carry out such purpose. The contention of the plaintiffs was that if this evidence was admitted, it would show them to be the owners of the Ewing head-right certificate under the devise in the will of James Park, and establish their title to the lands located by Kerbey under that certificate.

It is evident that the title of the plaintiffs to the relief prayed by their bill depends upon the admissibility of this evidence. The defendants object to the testimony. I am of opinion that the objection is well taken, and that the evidence should be excluded.

It has been held by the supreme court of Texas that head-right certificates, like that which it is alleged the testator owned, are personal and not real estate. *Randon v. Barton*, 4 Tex. 289; *Johnson v. Newman*, 43 Tex. 628; *Porter v. Burnett*, 60 Tex. 222. The offer of the plaintiffs is to show by extrinsic evidence the intention of the testator, in case the Ewing head-right certificate had not been located, to bequeath it to them in lieu of the land devised to them by his will; thus, by parol evidence, changing a devise of land to a bequest of personal property. The admission of this evidence would, in my judgment, be in violation of the established rules of the law of evidence relating to the subject. The rules for the admission and exclusion of parol evidence are the same in respect to wills as to contracts in writing generally. *Doe v. Martin*, 4 Barn. & Adol. 771; *Holsten v. Jumpson*, 4 Esp. 189; *Brown v. Thorndike*, 15 Pick. 400; *Lancey v. Phoenix Ins. Co.* 56 Me. 562; Cruise, Dig. (Greenl. Ed.) tit. 38, c. 9, §§ 1-15, inclusive; 2 Powell, Dev. (Jarman's Ed.) 5-11. They are the same in courts of equity as in courts of law. *Bertie v. Falkland*, 1 Salk. 231; *Towes v. Moor*, 2 Vern. 98; *Bennet v. Davis*, 2 P. Wms. 316;

Ware v. Cowles, 24 Ala. 446; *Forsythe v. Kimball*, 91 U. S. 291; *Hunt v. White*, 24 Tex. 643.

The rule on the subject under consideration has been thus stated: "Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." *Adams v. Wordley*, 1 Mees. & W. 379, 380; *Boorman v. Jenkins*, 12 Wend. 573; *Lazare's Ex'rs v. Peytavin*, 4 Mart. (La.) 684; 1 Greenl. Ev. § 275. As applied to wills, the rule is thus stated in 2 Powell, Dev. (Jarman's Ed.) 5-11: "Extrinsic evidence is not admissible to alter, detract from, or add to the terms of a will, though it may be used to rebut a resulting trust attaching to a legal title created by it."

The writing, if it be a contract, may be read in the light of the surrounding circumstances in order more perfectly to understand the meaning of the parties. If it be a will, the circumstances under which the testator executed it, or the state of his property, his family, and the like may be shown in order to throw light upon his intention, as expressed by the words used in the will. 1 Greenl. Ev. 277; 2 Powell, Dev. pp. 5-11, rule 8; *Hunt v. White*, 24 Tex. 643. But in both cases, as the writing is the only outward and visible expression of the meaning of the party or parties to it, no other words are to be added to it, or substituted for those used. "The duty of the court in such cases is to ascertain, not what the parties may have secretly intended as contradistinguished from what their words expressed, but what is the meaning of the words they have used." Greenl. Ev. § 277; *Doe v. Gwillim*, 5 Barn. & Adol. 122, 129; *Doe v. Martin*, 4 Barn. & Adol. 771-786; *Beaumont v. Field*, 2 Chit. 275.

In *Hunt v. White*, *ubi supra*, the rule was expressed, in substance, as follows: "The intent of the testator must be ascertained from the meaning of the words used in the will, and those words alone; but extrinsic evidence is admissible of such facts and circumstances as will enable the court to discover the meaning attached by the testator to the words used in the will, and to apply them to the particular facts of the case.

A distinguished writer lays down the rule of law upon this subject, as applicable to wills, as follows:

"As the law requires wills, both of real and personal estate to be in writing, it cannot consistently with this doctrine permit parol evidence to be adduced to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even when the consequence is the partial or total failure of the testator's intended disposition; for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected from extrinsic sources." 1 Jarm. Wills, 409.

This exposition of the law is sustained by a large array of authorities cited in the notes. This rule was applied by the supreme court of the United States in the case of *Mackie v. Story*, 93 U. S. 589. The

question in that case was whether the whole legacy bequeathed by a will to two brothers accrued to Benjamin Story, the survivor, or whether one-half of it did so, leaving the deceased intestate as to the other half. On the trial the children of Henry C. Story offered parol evidence to show the good will and affection of the deceased towards him for the purpose of demonstrating the intention of the testator in the bequest. The court ruled that the evidence was properly rejected; Mr. Justice BRADLEY, who delivered the judgment of the court, remarking: "The paper must speak for itself, and its meaning and effect be ascertained by the court."

The rule is further illustrated and sustained by the following authorities: In *Brown v. Selwin*, Cas. t. Talb. 240, the testator bequeathed the residue of his personal estate to two persons, whom he appointed his executors, and one of whom was indebted to him by bond. It was attempted to be proved by the evidence of the person who drew the will that he received the testator's written instructions to release the bond debt by the will, but that he refused to do so under the impression that the appointment of the obligor to be one of the executors extinguished the debt. Lord TALBOT held the evidence to be inadmissible, and his decree was affirmed on appeal by the house of lords. In *Strode v. Lady Falkland*, 3 Ch. Cas. 90, letters and oral declarations of the testator being offered to prove the intention to include a revision in the words "all other, my lands, tenements, and hereditaments out of settlement," it was unanimously agreed that this kind of evidence could not be admitted, for that, where a will was doubtful and uncertain, it must receive its construction from the words of the will itself, and no parol proof or declaration ought to be admitted out of the will to ascertain it. So, in *Munn v. Mann*, 14 Johns. 1, it was held that where a testator bequeathed to his wife "all the rest, residue, and remainder of the moneys belonging to his estate at the time of his decease," the word "moneys" did not comprehend bonds, mortgages, or other choses in action, and that the declarations of the testator to show a different intent were inadmissible. In the case of *Jackson v. Sill*, 11 Johns. 201, G. devised as follows: "I give and bequeath to my beloved wife, for and during her widowhood, the farm which I now occupy, with the whole of the crops of every description which may be thereon at the time of my death," etc., and after the remarriage or death of his wife, he devised the same to S. and his heirs. It was held that extrinsic or parol evidence to show that the testator intended to devise the whole of his real estate at W., which included a farm of 90 acres in the tenure of B., under a lease from the testator for seven years, and that he gave such instructions to the attorney who drew the will, was inadmissible, there being no latent ambiguity in the will, but only a mistake. See, also, Wig. Wills, props. 5, 6, 7; *Tucker v. Seaman's Aid Soc.* 7 Metc. 188; *Lord Walpole v. Earl of Cholmondeley*, 7 Term. R. 138; *Herrick v. Stover*, 5 Wend. 580; *Williams v. Crary*, 4 Wend. 443; *Ryers v. Wheeler*,

22 Wend. 148; *Doe v. Hiscocks*, 5 Mees. & W. 369; *Miller v. Travers*, 8 Bing. 244; *Okeden v. Clifden*, 2 Russ. 309; *Nourse v. Finch*, 1 Ves. Jr. 358; *Selwood v. Mildmay*, 3 Ves. Jr. 306; *Cambridge v. Rous*, 8 Ves. 22; *Bengough v. Walker*, 15 Ves. 514; *Herbert v. Reid*, 16 Ves. 485; *Brett v. Rigden*, Plow. 340; *Cesar v. Chew*, 7 Gill & J. 127; *Andress v. Weller*, 2 Green, Ch. 604, 608; *Comstock v. Hadlyme*, 8 Conn. 254; *Abercrombie v. Abercrombie*, 27 Ala. 489. In the case last cited, it was declared: "There is no legal principle more firmly established, none that has received a more constant and uniform support, than the rule which declares that an omission in a written will cannot be supplied by parol evidence." The authorities cited show the general rule applicable to the admission of extrinsic evidence to aid in the construction of written instruments, and are conclusive against the admissibility of evidence to establish a bequest which the testator did not make, when the testimony offered only showed his intention to make it.

But the plaintiffs contend that the devise to them of lands in Ellis county involves a latent ambiguity, and that the devise was in fact a bequest to them of the head-right certificate, and they insist on their right to introduce the evidence objected to, on the ground that it serves to remove the latent ambiguity. What is a latent ambiguity, is thus illustrated in *Bac. Law Tracts*, 99, 100:

"If I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all. But if the truth be that I have the manors both of South S. and North S., this ambiguity is matter of fact, and therefore it shall be holpen by averment whether of them it was that the party intended should pass."

So where a testator had two sons both baptized by the name of John, and, believing the elder son to be dead, devises his lands to his son John generally, and in fact the elder son was living, it was held that extrinsic evidence was admissible to remove the ambiguity and show which of the sons was intended to be the devisee. *Lord Cheney's Case*, 5 Rep. 686. The rule in respect to the admission of parol evidence to remove a latent ambiguity is thus stated by Lord ABINGER, in *Doe v. Hiscocks*, 5 Mees. & W. 363:

"There is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof an ambiguity arises as to which of two or more things, or which of two or more persons, each answering to the words of the will, the testator intended to express."

The case of *Miller v. Travers* is a leading case on this subject, and has always been regarded as of high authority. TINDAL, the chief justice of the common pleas, and LYNTHURST, the chief baron of the exchequer, were called in to assist BROUGHAM, the lord chancellor in the case. Their joint opinion was delivered by TINDAL, the chief justice, and is reported in 8 Bing., *ubi supra*. The case was this: The testator, by his will duly executed, devised "all his freehold and real

estates whatsoever, situate in the county of Limerick and in the city of Limerick," to certain trustees therein named and their heirs. At the time of making the will he had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick and considerable real estate in the county of Clare. The plaintiff concluded that he was at liberty to show by his parol evidence that the real estate in the city of Limerick was inadequate to meet the charges of the will, that the testator intended his estates in Clare also to pass under the same devise. He offered to prove by parol that the estates in the county of Clare were devised to him in the draught of the will, that the draught was sent to a conveyancer to make certain alterations not affecting the estates in the county of Clare; and that by mistake he erased the words "county of Clare," and that the testator afterwards executed the will without noticing the erasure. The court held that the evidence was inadmissible. In delivering judgment the chief justice said that cases of latent ambiguity range themselves into two separate classes:

"The first class is when his description of the thing devised or of the devisee is clear upon the face of the will, but upon the death of the testator it is found that there are more than one estate or subject-matter of devise, or more than one person, whose description follows out and fills the words used in the will. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular."

The court then proceeded as follows:

"But the case now before the court does not appear to fall within either of these distinctions. There are no words in the will which contains an imperfect, or, indeed, any description of the estates in Clare. The present case is rather one in which the plaintiff does not endeavor to apply the description contained in the will to the estates in Clare, but in order to make out such intention is compelled to introduce new words and a new description into the body of the will itself. * * * This, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will itself. It is not simply removing a difficulty arising from a defective or mistaken description: it is making the will speak upon a subject on which it is altogether silent, and is, in effect, filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator which he is supposed to have omitted."

These extracts from this opinion are directly in point. There is no latent ambiguity in this case which falls under either of the classes mentioned by Chief Justice TINDAL. The devise is of lands which, upon the face of the will, are well described. Now, if the testator had two tracts of land answering equally well the description, this would raise a latent ambiguity, and it would be competent by parol evidence to show which of the two was meant. Or if he owned but one tract of land, which, in some respects, was truly described in the devise, but in other respects not, parol evidence might be received to

remove the ambiguity of the description. But in this case it turns out that he has no land at all. There is, therefore, no ambiguity or imperfect description, but simply a mistake of the testator, who undertook to devise property of which he supposed himself to be the owner, but was not.

The plaintiffs are claiming title under the will to a piece of personal property; namely, a head-right certificate. There are not two head-right certificates to which the words of the will equally apply, nor is the description of the certificate which the plaintiffs claim true in part and incorrect in part. The certificate is not referred to at all in the will, in the remotest manner. But the plaintiffs offer to show by parol evidence that the testator, if he had no land which filled the description contained in the devise, intended them to have the certificate. This is not removing a latent ambiguity. In the language of Chief Justice TINDAL, it amounts to the making of a new devise for the testator, which he is supposed to have omitted. Its effect, if allowed, would be to show that the testator was mistaken in reference to the condition of his property, and to introduce into the will words not used by him, to obviate the consequences of the mistake. In fact, the plaintiffs, by the testimony offered, seek to introduce into the will an additional provision to the effect that if the head-right certificate purchased by the testator of Ewing had not been located, then instead of near 1,500 acres of land in Ellis county, the testator bequeathed to the plaintiffs the head-right certificate. This would not be the removing of an ambiguity for the purpose of giving effect to the will of the testator as he had written and executed it, but the making of another will for him. If the testator desired to make any such disposition of the certificate, in case it had not been located, he should have expressed his desire by proper words in his will, duly executed. But his will contains no devise of the certificate. The plaintiffs, under the pretext of removing a latent ambiguity, seek to establish such a devise for the testator by the testimony of witnesses, given 16 years after his death, to their recollection of the testator's verbal declarations. I think this is a case for the enforcement of the rule which excludes parol evidence to alter or add to the terms of a will.

I am, therefore, of opinion that the evidence offered should be excluded. Without its aid the plaintiffs show no ground for the relief prayed in their bill. It must therefore be dismissed, at their costs; and it is so ordered.

McCORMICK, J., concurred.

WESTERN UNION TEL. Co. and others v. BALTIMORE & O. TEL. Co.

(Circuit Court, D. Indiana. 1885.)

TELEGRAPH COMPANIES—EXCLUSIVE PRIVILEGES—PUBLIC POLICY.

A contract granting any person or company the exclusive privilege to do telegraphing upon or along any railroad is contrary to public policy, and void. This doctrine applied to Belt Railroad & Stock-yards at Indianapolis.

Application for Temporary Restraining Order.

McDonald, Butler & Mason, for complainants.*Harrison, Miller & Elam*, for defendants.

WOODS, J. Upon the facts, as deduced from bill and answer, it seems to me that the contract between the plaintiffs, in so far as it stipulates for an exclusive right on the part of the Western Union to do telegraphing business at and from the stock-yards, and especially in and from "the principal office" of the Union Railroad Transfer & Stock-yard Company, is illegal as being against public policy. To say that the cases in which this doctrine has been enunciated do not apply, or that the doctrine itself does not apply, to a contract for an exclusive right in respect to a particular building, such as the one in question is shown to be, would, as it seems to me, be unreasonable. Of the particular rooms, or parts of the building, leased to it, the Western Union Telegraph Company is, of course, entitled to the exclusive occupation and use; but, in respect to other parts, or rooms, of which it acquired and attempted to acquire no use or right of possession, the effort to restrict or limit the uses to which they should be put by others in competition with that company is clearly obnoxious to the doctrine, now well established, that an exclusive privilege to do telegraphing upon or along any railroad cannot be given to any person or company. *W. U. Tel. Co. v. Amer. W. Tel. Co.* 9 Biss. 72; *W. U. Tel. Co. v. Burlington & S. W. Ry. Co.* 3 McCrary, 130; S. C. 11 FED. REP. 1; *W. U. Tel. Co. v. Baltimore & O. Tel. Co.* 19 FED. REP. 660; *Pensacola Tel. Co. v. W. U. Tel. Co.* 96 U. S. 1; *W. U. Tel. Co. v. Amer. U. Tel. Co.* 65 Ga. 160; S. C. 38 Amer. Rep. 781; Rev. St. § 3964.

If, therefore, there is any ground upon which the injunction prayed for can issue, it must be because the defendant has, without right previously acquired, entered upon the right of way and lands of the defendant, the Union Railway, Transfer, etc., Co., and erected its poles thereon. But of this wrong, if it be a wrong, for which an injunction might issue, the Western Union Telegraph Company, for the reason already stated, either by itself or jointly with its co-plaintiff, has no right to complain; and in respect to its co-plaintiff the answer shows that its name as plaintiff has been used by the telegraph company under and by virtue of the provision to that effect in the contract between the two companies, and that otherwise the suit is not prosecuted

at the instance or for the benefit of the Belt Railroad & Stock-yard Company, but solely at the instance and for the benefit of the Western Union Telegraph Company. Even if, therefore, the Belt Railroad & Stock-yard Company, in a suit in its own name and for its own benefit, might enjoin such use of its land by the defendant until the right should be condemned and paid for, in accordance with the constitution of the state, the relief ought not to be granted in this action.

Quere, whether or not, as against the Belt Road & Stock-yard Company, the Baltimore & Ohio Railroad Company, under its lease, has not the implied right to carry a telegraph wire or wires into its office, in the building in question, for purposes incident to its own business; and if so, to erect on the lands and right of way of that company the necessary poles. If it had these rights, as I am inclined to believe it had, it could employ (as in fact it did employ) the defendant telegraph company to do the work for it, and this would be a complete defense to the action as predicated upon the constitutional provision against the appropriation of property without compensation first duly assessed and paid, and leave the case to stand wholly upon the contract for an exclusive privilege, which, as we have seen, cannot be permitted.

The application for a temporary restraining order is therefore overruled.

MARKET NAT. BANK and others v. HOFHEIMER and others.

(Circuit Court, E. D. Virginia. December, 1884.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—HOW FAR VALID.

A deed of assignment may be valid as to *bona fide* debts which it secures, and void as to fictitious and fraudulent debts attempted to be secured thereby.

2. SAME—PARTNERSHIP ASSIGNMENT.

An insolvent partnership makes a deed of assignment of specific property to a trustee, which provides for the payment equally and without preference of certain alleged creditors named in Schedule A, with the amounts purporting to be due them, and provides that, after the payment in full of the creditors in Schedule A of the amounts stated to be due them, certain creditors in Schedule B shall be paid the amounts therein stated to be due them. *Held*: (1) That the deed conveyed integral amounts to a series of integer creditors, and its provisions were several by the terms of the grant; (2) that as it did not provide for the contingency of some of the debts in Schedule A being fictitious, which they in fact proved to be, the amounts which were intended for them were not disposed of by the deed, remained in the grantor as to attacking creditors, and were subject to their claims.

3. SAME—PREFERENCES—CONSTRUCTION OF ASSIGNMENT.

That deeds of assignment giving preferences are to be construed strictly, and courts of equity will not interpolate phrases to carry out a possible intent to give preferences otherwise than as expressed.

4. SAME—SETTING ASIDE ASSIGNMENT—EFFECT.

That a successful attack by creditors upon a deed of assignment does not enlarge its operation as to those who claim under it.

5. SAME—ATTACKING CREDITOR ENTITLED TO BENEFIT.

Creditors attacking a deed of assignment and unearthing a fraud intended to be consummated thereby, are entitled to the rewards of their vigilance.

6. SAME—VIRGINIA RULE.

Wallace v. Treake, 27 Grat. 479, followed as to such attacking creditors.

In Equity.

Tunstall & Thom, for complainants and petitioners.

W. G. Elliott and Borland & Brooke, for defendants.

Wm. H. White, for trustee.

HUGHES, J. The defendant firm, Hofheimer, Son & Co., of Norfolk, Virginia, executed a deed of assignment, dated the twenty-third of July, 1883, to Theodore S. Garnett as trustee. They conveyed a stock of goods in a wholesale shoe business which they had been conducting in a double tenement, Nos. 84 and 86 Water street. They conveyed not only the goods then in their building, but their books, accounts, and choses in action to this trustee, who is also a defendant in this suit. The assignment was for the benefit—*First*, of certain persons described as creditors of the firm, enumerated in Schedule A annexed to the deed, who were to be paid in full, and whose claims aggregate \$88,714; and, *second*, of another set of creditors enumerated in Schedule B, whose claims aggregate \$34,320, and who were to be paid after the creditors of Class A had been satisfied. The creditors upon Schedule A, and the debts acknowledged by the deed to be due them respectively, were as follows:

Henshaw & Co.,	-	-	-	-	-	-	-	\$25,844	09
Burruss, Son & Co.,	-	-	-	-	-	-	-	6,250	00
The Exchange Nat. Bank of Norfolk,	-	-	-	-	-	-	-	10,000	00
Ottenburg Bros.,	-	-	-	-	-	-	-	3,796	54
Nathan Metzger,	-	-	-	-	-	-	-	700	00
A. E. Jacobs,	-	-	-	-	-	-	-	100	00
Isaac Gutman,	-	-	-	-	-	-	-	15,624	18
Isaac Moritz,	-	-	-	-	-	-	-	12,500	00
Henrietta Samuels,	-	-	-	-	-	-	-	9,400	00
L. W. Roberts,	-	-	-	-	-	-	-	4,500	00

\$88,714 81

The property which was conveyed by the deed has been sold and proceeds collected, and has produced in cash the sum of \$66,307.

No other property was conveyed by this deed, and the deed did not purport to convey any other than the goods and choses in action that have been mentioned. The deed contained no clause for the contingent benefit of any other creditors than those enumerated in Schedules A and B. It made no provision for a large number of creditors who were not embraced in either schedule; none for the benefit of the three complainants, or the three petitioners in the suit, whose claims aggregate about \$32,900, and are evidenced by negotiable notes. Fraud is not apparent on the face of the deed. It is conceded that the claims of all the creditors named in the two sched-

ules are *bona fide*, except of the four hereafter to be mentioned; and that the holders of the *bona fide* claims, and the trustee, T. S. Garnett, had no notice of the fraud affecting the four exceptional claims.

Soon after the execution of the deed, a bill was filed in this court by Edward Henshaw & Co., a beneficiary under it, against Hofheimer, Son & Co. and Garnett, trustee, on behalf of complainants and of all other creditors named in Schedules A and B, praying, among other things, that the trust should be administered under the supervision and control of this court. In that suit there were several consent decrees; among others one entered on November 26, 1883, making a distribution of a portion of funds in hand among the creditors of Class A. But there were excepted and withheld from this distribution the sums that would have been due to Isaac Gutman, Isaac Moritz, Henrietta Samuels, and L. W. Roberts, the aggregate of whose claims acknowledged and provided for by the deed was \$42,024; and whose dividends, withheld by the decree, would have been about \$31,209 in amount. To the decree of partial distribution entered in the suit brought by Henshaw & Co., just mentioned, the complainants in the present suit, by their counsel, consented.

The dividends of these four persons—Gutman, Moritz, Samuels, and Roberts—were withheld in consequence of the filing of the bill in the present suit. This bill charges that the deed of assignment under consideration was fraudulent in respect to the debts, or pretended debts, for which it provided in favor of those four persons, and was, as to those debts, a deed to hinder, delay, and defraud creditors. The suit was brought under section 2 of chapter 175 of the Code of Virginia, which authorizes creditors at large to bring suits in equity just as creditors by decree or judgment may do in other jurisdictions. The bill makes Gutman, Moritz, Samuels, and Roberts parties defendant. These persons have answered, and in their answers admitted of record that the debts were not due to them, and waive all claim under the deed. Among the agreed facts in this case is the concession that the deed was, as to the four exceptional claims, fraudulent; that these four persons were parties to the fraudulent intent; and that the deed was made to hinder, delay, and defraud creditors.

None of the creditors of Hofheimer, Son & Co., mentioned in the Schedules A and B, have made assault upon the deed on the ground of the latent fraud which it contained. They all claim under it, and none of them have repudiated it. Nor has any other creditor of this defendant firm assailed the deed, except the three complainants and the three petitioners in this suit. The fraud of the deed was detected and has been unearthed and assailed in court by them alone, so far as the proofs and pleadings in this cause speak upon the subject.

The complainants in this cause contend that, having by their vigilance, and at their own cost and risk, saved from distribution in payment of fictitious debts, the fund now in the hands of the trustee amounting, I believe, to a principal of \$31,209, they are entitled to

receive this fund, which is the fruit of their labor; and that the creditors in Schedule A, whose claims were *bona fide* are entitled to receive no more than they would have done if the four fraudulent claims had been valid; and that the creditors in Schedule B can take, as against complainants no other surplus than such as would have accrued to them if all the debts in Schedule A had been valid, and, as such, satisfied in full.

On the principle, *id certum est quod reddi certum potest*, I consider that, as the value of the property conveyed by Hofheimer, Son & Co. is now known to be \$66,307, or only about 74½ per cent. of the debts named in Schedule A alone, the deed of July, 1883, in effect and result provided that the fund arising from the property conveyed should be paid as follows, namely, (I use approximate amounts merely for illustration:)

To Henshaw & Co.,	-	-	-	-	-	-	-	-	\$19,262
Exchange Nat. Bank,	-	-	-	-	-	-	-	-	7,460
Burruss, Son, & Co.,	-	-	-	-	-	-	-	-	4,766
Ottensburg Bros.,	-	-	-	-	-	-	-	-	2,848
N. Metzger,	-	-	-	-	-	-	-	-	558
A. E. Jacobs,	-	-	-	-	-	-	-	-	74
I. Gutman,	-	-	-	-	-	-	-	-	11,650
I. Moritz,	-	-	-	-	-	-	-	-	9,323
H. Samuels,	-	-	-	-	-	-	-	-	7,013
L. W. Roberts,	-	-	-	-	-	-	-	-	3,362
									<hr/>
									\$66,307

If the incapacity of the fund to pay off these creditors of Class A had been known when the deed was executed, the provisions as to the contingent payment of the creditors in Schedule B would have been omitted; or, if inserted, would have been nugatory.

The deed conveyed integral amounts to a series of integer creditors. It was several by the terms of the grant. It did not provide for the contingency of some of the debts of Class A turning out *per fas aut nefas* to be *nil*. It did not provide that, if any of these debts in Schedule A should prove to be fictitious, then the fund arising from the non-payment of them should go, first to the creditors of Class A, and the residue, after paying these, to the creditors of Class B. The deed was silent as to such a fund. It cannot be made to provide for such a fund, except by the interpolation into it of words that are now wanting, and are necessary for the purpose. This fund was not in its contemplation, and is a *casus omissus*. Being silent as to this fund, the deed made no disposition whatever of it, as against assailing creditors. Not being disposed of at all by the deed, the fund remained in the grantors unassigned, and subject to the claims of any creditors of Hofheimer, Son & Co., who should pursue it; the most vigilant in the pursuit obtaining priority of right over it, according to the degree of their vigilance. It is useless to refer to authorities to show that a deed of assignment may be valid as to *bona*

fide debts which it secures, and void as to fraudulent debts. See *Billups v. Sears*, 5 Grat. 31, decided in 1848. See, also, as to other states, *Harris v. De Graffenreid*, 11 Ired. 89; *Anderson v. Hooks*, 9 Ala. 704; *Troutine v. Lask*, 4 Baxt. (Tenn.) 162.

Much learning and ability were displayed at bar in discussing this feature in the deed of Hofheimer, Son & Co. Many collateral principles of law incidentally relating to this feature have been ably presented and elucidated. I do not feel called upon to review these arguments, and the authorities cited in support of them, by learned counsel. This deed conveyed specific property, for the payment of several debts particularly described, in equal ratio. It provides that the amounts "set down opposite the several names in said Schedule A are to be paid equally and in full, without priority one above the other." Some of the debts were fictitious; and, as already said, the deed made no provision for the fund released from the payment of them. Does it require reasoning or authority to prove that the deed failed to make conveyance at all of that fund? We cannot interpolate omitted clauses in a deed, to suit the developments of a transaction like that of this defendant firm. Deeds of preference are to be construed strictly. They are in conflict with that prime and favorite maxim of chancery courts that "equality is equity." When they fail to make conveyance of property to creditors intended to be preferred over others, it is neither the duty nor disposition of the courts to supply, by construction, phrases necessary to effect their purpose. If express and appropriate language is wanting in them for such purpose, then the grant fails and falls.

Authority is not wanting for the propositions of law thus announced. See *Smith v. Post*, 3 Thomp. & C. (Sup. Ct. N. Y.) 647; *Prince v. Shepard*, 9 Pick. 184; *Green v. Morse*, 4 Barb. (Sup. Ct. N. Y.) 344, 345; *Tate v. Liggat*, 2 Leigh, 106. In the case of *Prince v. Shepard*, Chief Justice PARKER said: "We also consider this deed as capable of being construed as a several conveyance to each of the grantees in proportion to his debt." The learned judge was commenting on a deed in which the Princes had, by deed of assignment, secured a debt which was *bona fide*, and had also secured a debt to one Hodges, which was fictitious and fraudulent, as in the case at bar. The chief justice continued: "The attaching officer had a right to attach, as belonging to the debtors, so much of the property as was fraudulently assigned to Hodges, that being still, in regard to the creditors, left in the Princes," etc. As showing that in the event of a grant in favor of a fraudulent and fictitious claim being embodied in a deed it is no grant at all, the property pretended to be conveyed remaining in the grantor as absolutely as if no deed had been made, see *Prince v. Shepard*, *supra*; *Shipe v. Repass*, 28 Grat. 729; *Boyn-ton v. McNeal*, 31 Grat. 462; *Cox v. Wilder*, 2 Dill. 45.

It being clear that the quotas of the fund in the hands of the trustee dedicated to fictitious debts were not assigned at all as against

assailing creditors, but were "left in" the Hofheimers, and the complainants in their suit having established a lien upon it from the filing of their bill, the fund so intercepted by this suit must be disposed of in accordance with the rules laid down by the Virginia supreme court of appeals in *Wallace v. Treacle*, 27 Grat. 479. I will so decree.

HYNES, by her Guardian *ad litem*, v. CHICAGO, M. & ST. P. RY. CO.¹

(Circuit Court, D. Minnesota. February 14, 1885.)

1. PRACTICE IN CIRCUIT COURT—MOTION FOR NEW TRIAL—SETTLED CASE.

As no writ of error lies to the action of a circuit court in granting or overruling a motion for a new trial, and the only use of a case settled or stated in the state court is to prepare the case for review in an appellate court, a motion for a new trial may be heard in the circuit court without such settled case.

2. SAME—ARGUMENT BEFORE CIRCUIT JUSTICE AT WASHINGTON—JUDGMENT, WHEN RENDERED.

Although a circuit justice who has tried a case while on the circuit may hear argument on a motion for a new trial in Washington, he cannot there, without consent of the parties, render a judgment setting aside the one entered in the circuit court, but the motion may be continued from time to time until he can attend the court and make the necessary order.

3. SAME—VERDICT—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Evidence of contributory negligence held sufficient to justify setting aside verdict for plaintiff.

Motion for a New Trial.

O'Brien, Eller & O'Brien, and *I. v. D. Heard*, for plaintiff.

J. W. Cary, W. H. Norris, and *D. S. Waggoner*, for defendant.

MILLER, Justice. On this motion I am aided by liberal briefs of counsel on both sides. The case was tried before me at St. Paul in July, 1884, and judgment rendered on a verdict in favor of the plaintiff. An order was made under section 987 of the United States Revised Statutes, giving the defendant 42 days to file a petition for a new trial, which has been done. Neither party took any exceptions to the ruling of the court on the trial, and I am quite sure that no injustice was done the defendant in the course of the court. The question to be considered now is whether the verdict and judgment should be set aside because the former is not sufficiently supported by the evidence. Two questions of fact were controverted before the jury, viz., was the injury to plaintiff the result of the negligence of defendant's servants in charge of a car which struck the sleigh in which plaintiff was crossing the track of defendant? and if this is established, were plaintiff and those in charge of the sleigh guilty of such contributory negligence as would defeat the right to recover? As regards the first of these, while the evidence of the plaintiff was rather weak, there

¹Reported by Robertson Howard, Esq., of the St. Paul Bar.

was enough of it to forbid me to set aside the verdict on that ground. In regard to the second ground, I think the evidence was very strong, and very little to contradict it. It would serve no useful purpose here to go over it, as I recollect it; and my impression is clear, full, and strong now as it was then that the contributory negligence on the part of those in charge of the sleigh was fully established; that with any care,—I will not say reasonable care, but with any care which a prudent person would have practiced in crossing the railroad track at that time and place,—no collision would have happened. For this reason I am of the opinion that a new trial should be granted.

It is objected by counsel for plaintiff that this motion can only be heard upon a case settled, or stated according to the state practice. That rule, however, is established as a means of preparing for a review of the action of the trial court on the motion in some appellate court. In the courts of the United States no writ of error lies to the action of a court in granting or overruling a motion for a new trial. Such a statement is therefore useless. Mr. Heard objects to this motion being heard upon an affidavit upon the part of defendant setting out the evidence. I think this wholly immaterial, and have not read the affidavit, and do not need anything to remind me of what took place at the trial.

The counsel for plaintiff objects to a hearing of the motion at Washington city, and says while he files a brief he does not waive the objection. I do not deem it important where the argument of the case is heard. The effect of it upon the mind of the judge is not likely to be modified by that circumstance. But I do agree that I have no right, sitting here in Washington, to render a judgment setting aside the one already entered in this case. This has been often done by consent and agreement of counsel; and without such agreement I think my order made here would be of no force. But I see nothing to hinder the district judge or the circuit judge, or both, sitting in that court from adopting my views, if they believe them to be correct; or with the aid of these views hearing the case on the motion, and making such order there in term-time as they think right to make. If none of these methods can be adopted, the motion for a new trial can be continued from time to time until I can attend the court and make the necessary order. I return the papers in the case, with this opinion, to the office of the clerk of the circuit court.

BUGHER and others v. PRESCOTT and others.

(Circuit Court, W. D. Tennessee. February 21, 1885.)

1. CONSTITUTIONAL LAW—STATUTE WITH DEFECTIVE TITLE—TENNESSEE ACT OF 1873, CH. 118; CONSTITUTION OF 1870, ART. 2, § 17—TAX SALES.

A tax sale under the Tennessee act of 1873, c. 118, for the assessment and collection of taxes, is void, because the act contains legislation not expressed in its title, relating to state and county taxation, in which the subject of municipal taxation is not properly included.

2. SAME SUBJECT—TENNESSEE CODE, § 612 ET SEQ.

A proceeding to sell land for taxes, under the unconstitutional act of 1873, cannot be sustained as a proceeding under the Code, (sections 612 *et seq.*,) because the two methods of procedure for the sale of lands for taxes are radically different.

In Ejectment.

W. M. Randolph, for plaintiffs.

W. S. Flippin, for defendants.

HAMMOND, J. The defendants claim to have purchased the plaintiff's land at a tax sale, made under the act of the general assembly of the state of Tennessee of March 25, 1873, c. 118, entitled "An act to provide more just and equitable laws for the assessment and collection of revenue for state and county purposes, and to repeal all laws now in force whereby revenue is collected from the assessment of real estate, personal property, privileges, and polls." On the authority of the case of *Knoxville v. Lewis*, 12 Lea, 180, the foregoing act must be pronounced unconstitutional, because it violates article 2, § 17, of the constitution of the state, which provides as follows: "No bill shall become a law which embraces more than one subject, that subject to be expressed in its title. All acts which repeal, revive, or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended." Const. 1870, art. 2, § 17. That case declared unconstitutional an act of the general assembly of April 7, 1881, (chapter 171,) with precisely the same title as the act of 1873, because its section 50 related to *municipal* revenues, while no reference was made to that subject in the title. The same infirmity exists in this act of 1873, which, in section 81, legislates on the subject of *municipal* revenues under the very same title as the other. No two cases could be more alike, for any difference between the two acts in the character of the legislation on the subject of municipal revenue is wholly immaterial. The infirmity does not depend on the distinctive features of the eccentric legislation, but its subject matter. Any legislation concerning municipal revenues, under the title above quoted, must be, according to that decision of the supreme court of the state,—which is binding on us, whatever we may think of it,—sufficient to avoid the whole act as obnoxious to the constitution. *State v. McCann*, 4 Lea, 1; *Murphy v. State*, 9 Lea, 373, 379.

It is too plain for any argument that a tax title, acquired by a sale in pursuance of this act of 1873, cannot be supported as a sale held in conformity to the provisions of the previously existing tax laws found in the Code, (T. & S. Ed.) §§ 612 *et seq.* The act of 1873 was intended to be a radical change of the mode of selling lands for taxes, and it is vain to seek to support the defendants' title by the former acts, which were in no sense complied with, nor intended to be, in making the sale.

It is not necessary to decide any other question argued. The tax deed of the defendants cannot stand if the act under which the proceeding took place is void. The case having been submitted without a jury, there must be a judgment for the plaintiffs. So ordered.

CITIZENS' BANK v. BROOKS.

(Circuit Court, D. Vermont. October Term, 1884.)

1. ACTION ON JUDGMENT OBTAINED IN ANOTHER STATE—AUTHORITY OF ATTORNEY TO APPEAR FOR DEFENDANT.

In an action in a circuit court on a judgment obtained in another state, the record of the appearance of attorneys of the court for the defendant is not conclusive upon him, and he may show that they had no authority to act in his behalf.

2. SAME—RENDITION OF PERSONAL JUDGMENT—KNOWLEDGE OF DEFENDANT—TAKING DEPOSITION—PAYING COUNSEL.

Taking the deposition of a defendant, who is a citizen of another state, by the plaintiff, in an action under the Kansas statute to enforce the liability of stockholders, will not render the judgment obtained personally binding on such defendant, although he contributed to the common defense afterwards by furnishing funds to pay counsel.

3. PRACTICE—RENDITION OF JUDGMENT—DEATH OF DEFENDANT.

When the whole case is in the hands of the court, and before its decision is rendered the defendant dies, a judgment may be entered as of the day in the term when the last of the evidence was submitted.

At Law.

Martin & Eddy, for plaintiff.

Harkins & Stoddard, for defendant.

WHEELER, J. This is an action of debt on a judgment recovered in the circuit court of the United States for the district of Kansas for \$9,337.16 damages, and \$108.30 costs. The defendant has pleaded five pleas, in the last of which he alleges that he was not a citizen of Kansas, nor in Kansas, at the time of the commencement of that action, nor at any time afterwards; that no process in it was ever served upon him; that he never authorized or employed any attorney or other person to appear for him and in his behalf, nor authorized or empowered any person to employ or procure an attorney or other person to appear for him and in his behalf, and that no attorney or

other person ever had any authority to appear for him and in his behalf in that suit; and that he never entered his appearance therein in person. To this plea the plaintiff replies that the defendant had knowledge of the commencement and pendency of the suit, and did by his agents procure attorneys of the court there to appear for him and in his behalf in that cause, and that he did, by those attorneys, voluntarily appear in said cause and defend it, and after the judgment had been rendered, he paid the attorneys for their appearance in the cause and for defending it, and ratified and confirmed their appearance in and defense of it. The defendant traversed this replication, and issue to the country is joined upon it. The other pleadings are disposed of in such manner as to leave this one for trial, and it is tried by the court upon waiver in writing of a jury. The record shows service by attachment of property of the defendant as a non-resident of Kansas only, and an appearance and answer for the defendant by the attorneys named in the replication. The plaintiff claims that the record of the appearance in the cause of attorneys of the court for the defendant is conclusive of their right to appear for him, and that evidence to the contrary should not be considered. There are cases which perhaps go to this length. *Mills v. Duryee*, 7 Cranch, 481; *Lapham v. Briggs*, 27 Vt. 26. But it is now well settled in the courts of the United States that want of jurisdiction to bind the person may be shown in an action upon the judgment against the person. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-light Co.* 19 Wall. 58; *Hall v. Lanning*, 91 U. S. 160; *Graham v. Spencer*, 14 FED. REP. 603. The fact that the attorneys entered an appearance for the defendant is, perhaps, conclusively shown by the record, but that they had authority in fact, or any more than that they assumed to have authority, is not shown at all by it. The presumption that all was rightly done arising from their being officers of the court, is admitted to, and doubtless does, cast the burden upon the defendant of showing that the appearance was without his authority. The defendant testifies distinctly that he never employed, nor authorized the employment of any attorney to appear for him in the case, and there is no proof that he ever did. Three attorneys appeared; one at first, and two others afterwards. The testimony of the last two shows that they were engaged by the first, and he is dead, and nothing is produced to show that the defendant ever had any communication with him. A deposition of the defendant was taken by the plaintiff in Vermont, where the defendant resided, on notice accepted by the attorneys in Kansas, and filed in that cause, in which it is stated that the deponent "is the defendant" in the cause. After the judgment was rendered the attorneys telegraphed to the defendant: "Simonds writes refusing to be responsible for fees. Are we to be paid for services, and by whom? Answer definitely, quick." He answered: "We expect to pay our counsel." In a few days he sent \$300 for them.

The plaintiff relies upon this to sustain the allegation of the replication that he knew of the suit, and of the employment and appearance of the attorneys in it, and ratified their doings, and paid them for their services. The substance of the replication is that he voluntarily submitted himself to the jurisdiction of the court, and that the cause was thereupon tried.

If he was heard there upon the trial he has no right to be heard again upon the questions involved except upon appeal, but is bound. That he had notice of the suit, however full and formal, out of the jurisdiction would not bind him. He could not be compelled to appear by anything done without the jurisdiction. *Bischoff v. Wethered*, 9 Wall. 812. Therefore taking his deposition would not bind him. The other party had the right to take it in order to obtain a judgment to bind the property attached, but he could not be made a party personally in that manner; if he could, the jurisdiction of courts could be extended without their territorial limits by merely resorting to that proceeding.

The suit was founded upon an alleged liability of the Adams bank, a state bank of Kansas, of which the defendant and Simonds mentioned in the telegram and others were stockholders, to the plaintiff, and a statute of Kansas making stockholders personally liable on the dissolution of the corporation. The statute also provided for contribution between stockholders when any were made to pay. Comp. Laws Kan. 233, § 44. The defendant testifies that he understood that there was litigation going on in Kansas in respect to the liability of the Adams bank to the plaintiff, but not that it was against him personally, and that some of the other stockholders were defending it, and that the telegram referred to that litigation; and he testifies that the money which he sent was contributed by other stockholders residing near him as well as himself, and sent to one of those whom he understood to be defending to aid in paying the attorneys, and not to the attorneys as his attorneys. No one is called to contradict this testimony, and there is nothing opposed to its correctness unless the circumstances contradict it.

From the circumstances it is apparent enough that the other stockholders, or some of them, employed the attorneys to appear and defend this case on account of their interest in the result; and from his testimony, that he did not know that his personal liability was being passed upon, although he knew that what might affect him ultimately was involved. Although he knew of, and was willing to and did contribute to, the common defense, he does not appear to have in any way ratified or confirmed the submission of his personal liability to the judgment of the court. As the plaintiff had, and was entitled to, no proceedings to compel his personal appearance, it could not be had without he knowingly and voluntarily yielded it, and he could not ratify the assumption of others to appear and submit his case for him without knowledge of what they had assumed

to do for him. This is not intended to imply that what was done without jurisdiction over his person could be made binding upon him by any ratification after the judgment. Jurisdiction over the person at the time of the judgment is necessary to its validity as a personal judgment. A defendant might probably compensate any one who had, without his knowledge, undertaken the defense of a suit against him which might bind his property and failed, and not subject himself to the consequences of making the judgment bind him personally, when before it would only bind his property. The issue joined upon the replication to the fifth plea is found for the defendant.

The testimony in the case was closed on February 5th, except that there was reserved to the plaintiff the privilege of having the testimony of a witness who was sick and unable to attend, taken by the court at the residence of the witness on the next day, to the same effect in all respects, by consent of the parties, as if taken in court on that day. The death of the defendant was suggested on the opening of court the next day as having taken place after adjournment on the evening before. The plaintiff objected to anything further being done, but waived the taking of the testimony of that witness. The whole case was in the hands of the court during the life of the defendant. The arguments of counsel are in aid of its consideration.

In *Broas v. Mersereau*, 18 Wend. 653, a verdict was taken after the death of the party. In *Trelawny v. Bishop of Winchester*, 1 Burr. 219, judgment was rendered as of a time prior to the death, which occurred while the case was pending for argument. This was a common proceeding in the English courts from early times. Bac. Abr. "Abatement," F. And it is said by METCALF, J., in *Springfield v. Worcester*, 2 Cush. 52, to be the common course when an action which would fail by the death of either party before judgment is continued for argument or advisement, whether there has been a verdict or demurrer or agreed statement of facts, and one of the parties afterwards dies, to enter judgment as of a former term. This is all in the same term, and it seems proper that the case should be argued, considered, and judgment rendered as of the day in the term when the last of the evidence was submitted.

Judgment for defendant as of February 5th.

MEALEY v. METROPOLITAN LIFE INS. CO.

(Circuit Court, D. Rhode Island. February 26, 1885.)

PRACTICE—MOTION TO FILE INSTRUMENTS PLEADED IN DEFENSE IN CLERK'S OFFICE—PUB. ST. R. I. c. 214, § 45.

In an action on a policy of life insurance defendant filed several pleas, setting out that the statements and answers to certain questions contained in the application and medical examination which formed part of the contract of insurance, were untrue, and specifying the particular statements so alleged to be untrue, and making profert of the application and medical examination. Plaintiff moved for an order on defendant to file the application and medical examination in the clerk's office. *Held*, that the motion could not be granted.

Motion for Production and Filing of Certain Papers.

W. F. Angell and C. Bradley, for plaintiff.

W. G. Roelker, for defendant.

CARPENTER, J. This is an action on a policy of life insurance; and the defendant files several pleas setting out that the statements and answers to certain questions contained in the application and medical examination, which form part of the contract of insurance, are untrue, and specifying the particular statements so alleged to be untrue, and making profert of the application and medical examination. The plaintiff now moves for an order on the defendant to file the application and medical examination in the clerk's office. The motion is not properly framed as a demand of oyer, since the order granting oyer would provide only that the plaintiff have a copy of the instrument, and not that the original instrument be put on file. The motion has, however, been argued as though it were a proper demand of oyer, and in that light I have considered it. In the first place, it is to be noted that the plea does not show that the agreement is under seal, and, consequently, profert was unnecessary, and oyer cannot be demanded. The authorities cited by the defendant abundantly sustain this position. 1 Chit. Pl. *430, *431; *Sneed v. Wister*, 8 Wheat. 690. Indeed, the order here asked seems to be prohibited by implied exclusion, by the twenty-third law rule for this circuit, which reads as follows:

"Oyer of all specialties declared on may be had on motion at the return term, but not afterwards, unless by special order of court, on affidavit of special cause."

It was, however, the practice of the English courts, and is the practice with us, in cases where oyer is not demandable, but in which the court can see that a knowledge of the instrument in question is proper and necessary for either party, to make an order that he have a copy. But in the practice of the courts of Rhode Island, which is followed by this court, the proceeding to be taken in order to obtain an order of this kind is prescribed by the law of the state in Pub. St. c. 214, § 45, which is as follows:

Whenever either party to any proceeding at law or equity in the supreme court, or to any proceeding at law in the court of common pleas, shall set

forth in writing, under oath, upon his knowledge or belief, that the opposite party is in the possession or control of some document to which the applicant is entitled, such court or a justice may order such opposite party, or if the same be a body corporate, then some officer thereof, to make answer on oath at or before a time to be fixed in said order, as to what document he so has relating to the matter in dispute between the parties, or what he knows as to the custody of such document, and if in his possession or control, whether he objects to the production of the same and the grounds of such objection; and thereupon such court or justice may require the production of said document, or may compel the party having the same in his possession or control to allow the applicant to inspect the same, and, if necessary, to take examined copies of the same; and may make such further order thereon as shall be just.

This present motion is not framed in accordance with the statute, and it must be dismissed.

*In re Account of District Attorney.*¹

(*District Court, E. D. Missouri.* January 30, 1885.)

DISTRICT ATTORNEY'S FEES—SECTION 838, REV. ST., CONSTRUED.

Expenses and services of district attorneys, in examining revenue reports upon which no actions are thereafter instituted, fall within the rule for compensation prescribed by section 838 of the Revised Statutes.

William H. Bliss, U. S. Dist. Atty., *per se*.

TREAT, J. An account of the United States district attorney is presented for the certificate of the judge, under section 838, as to certain cases enumerated. Under section 824 his fees in most cases become certain, as the court records show them; yet there are many concerning which evidence *dehors* the court records are necessary, viz., presence before commissioners, travel, etc. It is important to look at the dates of the statutes, so that the imperfections or mischiefs to which later statutes are aimed may furnish guides for interpretation. Under section 824 (looking to the dates of the acts consolidated) the district attorney was allowed fees only in cases actually instituted in this court, or with respect to proceedings before United States commissioners, and attendant travel. It became apparent to this court, years ago, that such proceedings before United States commissioners were liable to abuse, involving injury to parties proceeded against, and instituted, it might be, to give fees to deputy-marshals and commissioners, and involving unnecessary fees and traveling expenses for the district attorney. Hence the following rule of court was made, and later the proper department suggested a like rule for all United States courts:

In every criminal proceeding before a United States commissioner, he shall, before issuing subpoenas for the hearing of the case, cause the proper United States district attorney to be informed thereof, and await a reasonable time

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

his action with reference thereto; and when the commissioner has disposed of the case he shall cause the original complaint, together with a brief statement of his action thereunder, and the original recognizance, if any, and copy of the commitment or *mittimus*, duly certified, to be promptly filed in the clerk's office of the proper United States court; and before taking bail, when the prisoner is held for the action of a grand jury, the commissioner should cause notice of the time and place for hearing the application for bail to be given to the district attorney.

In the ordinary administration of the law, when complaints were made, the district attorney was bound to act thereunder, by refusing to proceed thereon, or by causing examination to be had before commissioners, etc. If he was of opinion that the complaint was groundless, it was his duty to proceed no further. It is true, that a large measure of responsibility was thus cast upon him, yet, as he represented the government that prosecutes offenses, and never prosecutes the innocent, the duty to determine when complaints were frivolous, or otherwise, rested primarily with him. Were not this so, he would make, through his office, the government the agent of private malice or of blackmail. There must be, in the very nature of judicial administration, a preparatory examination by the district attorneys as to private complaints; otherwise, the innocent as well as the guilty would be alike confounded by indiscriminate prosecutions, at the instigation of those who have only personal ends to subserve. As the law then stood, and now stands, the accused, however wronged, pays his own costs and expenses; so that it often happens that the innocent, when acquitted, suffer more than the guilty. Such a condition of affairs caused this and other courts to exact careful scrutiny from district attorneys prior to the prosecution before commissioners or the court. But under the revenue systems collectors undertook to discriminate in cases of violations of law, and on their judgment reported or refused to report alleged offenses. They made themselves thereby judges, in a modified sense, of such offenses. Congress cut up (section 838) such arbitrary power or conduct, by requiring all such matters to be reported to the district attorney. On the incoming of such reports it was made the duty of the district attorney to examine the same, and institute proper proceedings in court, "*unless upon inquiry and examination he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings be instituted.*"

This statutory rule sought to enforce elemental principles, coupled with an obligation upon revenue officers to report to the district attorney. It is obvious that if the district attorney, in order to accumulate fees, caused judicial proceedings to be instituted on every report so made, not he alone, but other officers, would devour the government, or the accused, with useless costs and expenses; hence the wise provision of section 838, viz.:

"And for the expenses incurred and services rendered in all such cases, [where it was decided not to bring suits,] the district attorney shall receive

and be paid from the treasury such sum as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of."

Resting upon an extremely narrow and technical construction of the words last quoted, it is said that the treasury department has ruled that the provisions of this section apply only to cases actually instituted, thereby defeating the broad purpose and just ends sought to be obtained by the statute. There was no need of a new statute to give the district attorney fees in cases instituted; but there was need of compelling him to bring no suits until full examination first had in his office. If suits were to be brought on all reports made, however frivolous, and thereby his and other costs incurred to the detriment of the public treasury, and the outrage of the citizen, the statute in question would not have been passed. To prevent so lamentable a condition of affairs, and to secure an honest and diligent investigation, congress provided that for such investigation proper compensation be awarded, without compelling the unjustifiable and expensive process of useless litigation. But it is urged that the language of section 838 is confined in terms to a "certificate of the judge before whom such cases are tried or disposed of;" and hence the district attorney, who by the section is required to make due "inquiry and examination" to avoid wrongful suits, must lose all compensation, or bring suits regardless of their merits. Such an interpretation seems suicidal. In a very narrow sense no "case" is tried or disposed of by a judge until formally instituted in court; yet many accusations and proceedings, through *habeas corpus*, or before commissioners, etc., are "disposed of" without technical trial. The term "case," as used in the statute, was intended to cover, and does cover, all complaints reported by revenue officers to the district attorney, which might be subject to the final determination of the court, by trial or other action therein. They have come within the reach of judicial administration, and are within the purview of the statute. If this be not so, then the mischief sought to be cured will still exist with increased force.

It is held, therefore, that the expenses and services of the district attorney's office in examining revenue reports, when no judicial action thereon is thereafter formally instituted, fall within the rule for compensation prescribed. True, the judge must be satisfied as to said expenses and services in order to certify what is "just and reasonable." Some of the cases involve as large a measure of "inquiry and examination" as if they had passed through indictments to a final trial, with heavy costs for witnesses and jury service; all of which can be saved to the government, and consequently are within the purview of the statute.

What is meant, under section 838, by "cases tried or disposed of before the judge?" Section 824 fixed the fees of the district attorney in case formally prosecuted before the court. Hence, if section 838

is to be limited to such cases, then there is no ground for the action of the judge, unless section 824 is to be construed to override the provisions of section 838. If the latter section is designed to cover all "cases" instituted in court formally, and no others, then what becomes of the fixed rates under section 824? May the judge disregard statutory fees? What are tried, etc., before the judge as contradistinguished from the court? If the views suggested limiting compensation to "cases" formally instituted, are to prevail, then a direct conflict between those sections is presented. The two sections are reconcilable. They pertain to different matters. Section 824 fixes rates of compensation when suits, etc., are formally instituted, and section 838 provides for the compensation to be given when suits are not instituted on revenue reports made, but disposed of by the district attorney in his office. Section 838 must be limited to the latter "cases," and is designed to provide therefor. Otherwise section 824 is in conflict. The purpose of the statute is to fix fees in prescribed cases under section 824, and to leave to the judge, under section 838, the determination of the proper measure of compensation in cases disposed of in the district attorney's office, which, though not formally before the court, may be brought there. Otherwise the judge might allow, under section 838, compensation regardless of section 824. In one sense cases are not determined by the judge as such, but by the court. Certainly narrow distinctions of that nature should not defeat the clear intent of the statute.

It is not necessary to enter upon a discussion, heretofore presented to this court, of the constitutional validity of acts of congress devolving on judges, *vis nominibus*, the functions of auditors. It must suffice that the measure of compensation should be largely measured by rates named in section 824. Taking those rates as a guide, I have examined the account in open court. Until the act of February 22, 1875, (Supplement, p. 145, c. 95,) the acts of congress seemingly contemplated the immediate auditing by the judge, without formal proceedings in open court. Since that act all accounts for fees, etc., whether under section 824 or 838, should be considered as within the act of February 22, 1875. Hence I have caused this account to be presented in open court, and after consideration thereof the court orders the same approved.

In re BAKER.

(Circuit Court, D. Rhode Island. February 13, 1885.)

1. ENLISTMENT OF MINOR IN ARMY—DISCHARGE ON HABEAS CORPUS.

A minor who has been enlisted in the army without the written consent of his parents or guardians entitled to his custody and control, will be released on *habeas corpus* issued on petition of such parents or guardians.

2. SAME—JURISDICTION OF COURT-MARTIAL—DESERPTION.

In such case, a court-martial cannot retain jurisdiction of the enlisted man under charges of desertion.

Habeas Corpus.

Darius Baker, for relator.

Cyrus M. Van Slyck, for respondent.

CARPENTER, J. This is a writ of *habeas corpus* issued on the petition of Augustus E. Baker and Augustus T. Baker, and directed to Clement L. Best, colonel of the Fourth Artillery, commanding him to produce the body of the said Augustus E. Baker. The return, and the proofs, which are not disputed, show that Baker enlisted in the army on the eighteenth day of December, 1884; that he afterwards deserted the service, and was apprehended and returned to Fort Adams; and that charges of desertion have been filed against him pursuant to the forty-seventh article of war, (Rev. St. § 1342,) and that he is now held for trial on said charges. The proofs further show that he was, at the time of his enlistment, and still is, under the age of 21 years; that the relator, Augustus T. Baker, is his father, and is entitled to his custody and control, and has never consented to the enlistment. The forty-seventh article of war is as follows:

"Any officer or soldier, who having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct."

The language of Rev. St. § 1117, is as follows:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: provided, that such minor has such parents or guardians, entitled to his custody and control."

The relators contend that the enlistment, being made contrary to law, is absolutely void; that, consequently, Baker has not, at any time, been "duly enlisted in the service of the United States," and has not been capable to commit the crime of desertion; and that a court-martial has no jurisdiction over him on such charges; and that, finally, the respondent has no right to restrain him, either to service under his enlistment, or for punishment for the offense with which he is charged. On the other hand, it is contended on behalf of the military authorities that the enlistment is voidable only, and not void, and that the recruit remained subject to military authority, and hence

liable to punishment for violation of the articles of war, until such time as the contract of enlistment should be avoided, and, consequently, that he may be lawfully restrained by the respondent, at least until the judgment of the court-martial shall be pronounced on the pending charges.

In cases where there was no statutory prohibition against the enlistment, and where the contract was sought to be avoided on the sole ground that it was made by a person under age, it is well settled that the recruit is to be taken to be an enlisted man, and subject to punishment for violation of his duty as such, until the contract shall be avoided by proper proceedings. This rule is plainly laid down by Judge LOWELL, *In re Wall*, 8 FED. REP. 85, and is abundantly supported by the cases there cited. It is to be noted, however, that in *Wall's Case*, as well as in all the cases there cited, with two exceptions, to which reference will be hereafter made, it appeared that there was no statute prohibiting the enlistments. Those cases are not, therefore, of authority here. In *Com. v. Fox*, 7 Pa. St. 336, the prisoner had enlisted in the army, and had deserted and surrendered himself, and it appeared that he was the minor son of the relator, who had never consented to the enlistment. He was discharged from custody. It seems also to be a clear inference from the language of Judge WALLACE, *In re Davison*, 21 FED. REP. 618, that a similar order would have been made in that case if the parent of the soldier entitled to his custody and control had made application for his discharge. In *U. S. v. Hanchett*, 18 FED. REP. 26, the soldier, in a case similar to this, was discharged on his own application. On the other hand, it is to be noted that in *McNulty's Case*, 2 Low. 270, the prisoner, who had enlisted in the marine corps contrary to the prohibition of the statute, was discharged on the ground, as stated in the opinion, that the enlistments were "voidable by the minors themselves, or by their parents, as well as by the government;" and this case was referred to in *Wall's Case*, cited above, as authority for the decision there made. It seems, therefore, to be declared in both cases that an enlistment such as that now in question is not to be held absolutely void. If such a conclusion had appeared to be deliberately expressed by the learned judge who delivered the opinion in both those cases, it would undoubtedly be entitled to much consideration, although not necessary to the decision of the cases then in hand. But it appears to me that the opinions do not contain clear evidence of such deliberate conclusion. In the first place, the opinion in *McNulty's Case* contains no discussion, and no express statement, as to whether the enlistment is voidable in distinction from being void; and it seems to me, from the reading of the whole opinion, that when the argument of the case had progressed so far in the mind of the judge as to reach the conclusion that the enlistment was voidable, from which it necessarily followed that the prisoner must be discharged, the consideration of the further question, whether it was not also absolutely void, may have been postponed.

In the second place, it is a significant observation that in *Wall's Case* the authority of *Com. v. Fox* is denied, on the express ground that in that case the judges found that the statute made the enlistment absolutely illegal. It does not indeed appear that the authority of that case would have been followed if it could not have been distinguished; but it seems extremely probable that the case would have been distinctly overruled if the judge, on consideration of *McNulty's Case*, had deliberately determined to announce the doctrine here contended for on behalf of the military authorities.

It seems to me that the effect of the statute is to make the enlistment absolutely void, and that it must be so held on the application of any person who is not estopped from setting up the prohibition. In this case, the application being made both by Baker and by his father, I do not find it necessary to decide whether he could be discharged on his own application alone. My conclusion is that the enlistment is void as to the father, and must be so held on his application. It follows that Baker was not "duly enlisted," that he could not commit the crime of desertion, and that the court-martial cannot retain jurisdiction under the pending charges. He will therefore be discharged.

In re MILLER.

(*Circuit Court, W. D. Pennsylvania.* February 18, 1885.)

1. EXTRADITION—TREATY WITH GREAT BRITAIN OF 1842—HOLDING FUGITIVE—CRIME.

Under the treaty of 1842, between the United States and Great Britain, an extradited fugitive may be held by the receiving government on his prior conviction and sentence for a non-extraditable crime.

2. SAME—DEFENSE—GOOD FAITH OF EXTRADITION PROCEEDINGS.

In the tribunals of his own country the surrendered fugitive cannot question the good faith of the extradition proceedings.

Habeas Corpus.

J. T. Maffett and Wm. R. Blair, for petitioner.

E. A. Montooth, *contra*.

ACHESON, J. The petitioner claims his discharge on the ground that he is unlawfully held in custody in violation of the tenth article of the treaty of 1842 between the governments of the United States and Great Britain. Briefly, the facts of the case are these:

The petitioner was convicted of burglary in the court of oyer and terminer of Clarion county, Pennsylvania, and thereupon was sentenced on August 23, 1881, to undergo an imprisonment for the period of seven years in the Western Penitentiary of Pennsylvania, to which prison he was duly committed. In December, 1881, he escaped therefrom and fled to Canada. Burglary not being an extradition crime,

informations were made in January, 1882, in said county of Clarion, against the petitioner, charging him with robbery and assault with intent to commit murder, and under extradition proceedings had on these charges he was surrendered on March 11, 1882. He was then taken back to the Western Penitentiary of Pennsylvania, where he has since been held. Bills of indictment against him on the said charges of robbery and felonious assault were ignored by the grand jury of Clarion county on January 17, 1883. The petition alleges that said informations were gotten up by the penitentiary authorities as a mere pretext to secure the petitioner's surrender, to the end that they might seize and imprison him on his conviction for burglary. The return of the warden of the penitentiary sets up, as his authority for holding the petitioner, his commitment to the penitentiary by the court of oyer and terminer of Clarion county under his conviction and sentence for burglary.

The application for the petitioner's discharge proceeds upon the theory that the treaty between the United States and Great Britain secures to the extradited person immunity from detention for any crime other than that upon which the surrender is made; or, at least, exemption from detention for any offense not within the treaty. Now, it is indeed true that it has been held by Judge HOFFMAN, in *U. S. v. Watts*, 14 FED. REP. 130, and by the supreme court of Kentucky, in *Com. v. Hawes*, 13 Bush; 697, that an extradited person under this treaty cannot be tried for any offenses other than extradition crimes; and in *State v. Vanderpool*, 39 Ohio St. 273, the supreme court of Ohio carried the doctrine of exemption still further, holding that the extradited person could be put on trial only for the particular offense for which he had been surrendered. Upon these adjudications, which, on account of the eminence of the judges and courts pronouncing them, are certainly entitled to great respect, the petitioner's counsel confidently rely as establishing a principle applicable to and decisive of this case. But then, on the other hand, in *U. S. v. Caldwell*, 8 Blatchf. 131, and *U. S. v. Lawrence*, 13 Blatchf. 295, it was held by Judge BENEDICT (who gives most cogent reasons for the conclusion) that extradition proceedings do not by their nature secure to the person surrendered for one crime immunity from prosecution for other offenses, whether within the treaty or not; and he distinctly ruled that no such immunity is conferred by the treaty now under consideration. A like determination was reached by the court of appeals of New York in *Adrianse v. Lagrave*, 59 N. Y. 110, where an extradited person, surrendered by the government of France under treaty stipulations, was arrested on civil process.

The question whether the treaty of 1842 between the United States and Great Britain prohibits the trial of the extradited person for an offense not specified in the proceedings or named in the treaty, must, therefore, be regarded as still open, while the precise question now before me, it would seem, is altogether new. If the treaty affords

the petitioner the immunity he claims, it is by mere implication, for assuredly it does not in express terms confer on extradited persons any immunity whatsoever. It provides that the respective governments, upon requisition made and upon satisfactory evidence of the alleged criminality, shall "deliver up to justice" all persons who, being charged with any of seven specified crimes, (of which burglary is not one,) committed within the jurisdiction of either, shall seek an asylum or be found within the territories of the other. There is, however, no provision in the treaty guarantying to the extradited person the right to leave the demanding country after his trial for the offense for which he was surrendered, in case of acquittal, or, in case of his conviction, after his endurance of the punishment therefor. Nor is there any express limitation upon the causes of his detention. Indeed, as to his disposition after his surrender the treaty is altogether silent. The high contracting parties might have provided for a surrender upon conditions, but they have not seen fit to do so. Whence, then, springs the petitioner's supposed immunity? Upon what sound principle can the demand of this convicted criminal, to be set at liberty before the expiration of his sentence, be allowed? Clearly, an offender can acquire no rights against the claims of justice by flight to a foreign jurisdiction, (*State v. Brewster*, 7 Vt. 118; *Dow's Case*, 18 Pa. St. 37;) and extradition treaties are not made in the interest of fugitive criminals. In the absence, then, of express stipulation imposing restraints upon the receiving government, it seems to me the intention is not to be imputed to the parties to the treaty to exempt the surrendered fugitive from deserved punishment for an offense (regarded by the laws of both countries as a gross crime) of which he had previously been duly convicted. It may have been open to the petitioner, when before the Canadian courts, to show that the extradition proceedings were not prosecuted in good faith. But, having been surrendered, it is not for him to raise that question before the tribunals of his own country. *Adriance v. Lagrave*, *supra*; *Dow's Case*, *supra*.

I am of opinion that the petitioner's complaint, that he is in custody in violation of the treaty under which he was extradited, is groundless. Hence his discharge must be denied; and it is so ordered.

UNITED STATES v. VAN VLIET.

(District Court, E. D. Michigan. February 23, 1885.)

1. CRIMINAL LAW—TAKING EXCESSIVE PENSION FEE—U. S. v. VAN VLIET, 22 FED. REP. 641, REVERSED.

The right to prosecute for a violation of Rev. St. § 5485, in demanding and receiving a greater compensation for services in procuring a pension than is allowed by law, when the offense was committed prior to the act of July 4, 1884, is saved by section 13 of the Revised Statutes. The case of *U. S. v. Van Vliet*, 22 FED. REP. 641, reversed.

2. SAME—DEMURRER TO INFORMATION—MISTAKE OF LAW.

If a demurrer to a valid information be sustained under a mistaken view of the law, and the judgment is afterwards reversed, the defendant may be rearrested, and put upon his plea to the merits.

On Rehearing of Demurrer to Information.

Defendant was prosecuted by information of the district attorney for a violation of Rev. St. § 5485, in demanding and receiving a greater compensation for his services and instrumentality in prosecuting certain claims for pensions than was allowed by law. A demurrer was interposed, upon the ground that the law fixing the compensation for such services had been repealed, and hence that there could be no conviction. This demurrer was sustained, and the district attorney moved for a rehearing.

S. M. Cutcheon, Dist. Atty., for the United States.

I. T. Cowles, for defendant.

BROWN, J. Upon the original argument I sustained this demurrer, upon the ground that the act of 1878, fixing the amount which pension agents were entitled to charge for their services, had been repealed by the act of July 4, 1884, without saving the right to prosecute for offenses committed prior to the repealing act. *U. S. v. Van Vliet*, 22 FED. REP. 641. Since then my attention has been called to section 13 of the Revised Statutes, which enacts that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." This section escaped the notice both of court and counsel. I consider it a complete answer to the demurrer. It was at one time doubted whether it applied to criminal prosecutions, but the case of *U. S. v. Ulrici*, 3 Dill. 532, and *U. S. v. Barr*, 4 Sawy. 254, have apparently put the question at rest. The case of *U. S. v. Tynen*, 11 Wall. 88, was decided in view of the law in force before the act of February 25, 1871, which first contained this section, was passed.

There is no legal objection to the rearrest of the defendant. The constitutional provision, that no person shall "be subject for the same offense to be twice put in jeopardy," has no application until a jury

has been impaneled and sworn. 1 Bish. Crim. Law, (5th Ed.) §§ 1014-1016. The very case presented by the record here is thus stated by Mr. Bishop, (section 1027:)

"For example, if, without a trial, the court quashes a valid indictment, or gives the defendant judgment on demurrer, under the erroneous belief that it is invalid, a trial may be had after the prosecutor has procured the reversal of this judgment, because, as we have already seen, the prisoner is not in jeopardy until the jury is impaneled and sworn."

The motion of the district attorney for a *capias* is therefore granted.

GOODYEAR and another v. HARTFORD SPRING AXLE Co.

(Circuit Court, D. Connecticut. February 27, 1885.)

PATENTS FOR INVENTIONS—NOVELTY—STEELE SAND-BOX FOR CARRIAGE AXLES.

Letters patent No. 62,231, granted to John S. Steele, February 19, 1867, for an improved sand-box upon carriage axles, examined, and held void for want of novelty.

In Equity.

Henry T. Blake, for plaintiffs.

Wm. Edgar Simonds, for defendant.

SHIPMAN, J. This is a bill in equity to prevent the alleged infringement of letters patent granted to John S. Steele, February 19, 1867, for an improved sand-box upon carriage axles. The patentee says in his specification:

"My invention consists in a light, extra sand collar, C, placed upon a common axle a short distance from the wearing collar, A. The chamber, E, thus formed by the collar, A, collar, C, and covering, D, prevents the mud and dust from coming in contact with the wearing collar, A. The housing or covering, D, is formed by an expansion and continuation of the pipe-box, F."

The claim was for "the sand collar, C, and chamber, E, in combination with the extended pipe-box, F, for the purpose set forth."

The question in the case is that of patentable novelty.

A "common axle" is an axle that has a single nut in front, with a solid collar, or collar "shrunk on," at the inside end. The collar at the back forms a bearing surface, which receives the endwise play of the hub or of the edge of the axle-box, which is driven through the hub. The advantages of the axle were that it was "easily made and convenient to oil;" its disadvantage was that sand would find its way to the inside end, so that the surface at the collar was liable to be rapidly worn away. The "half-patent axle" was the common axle with the axle-box enlarged at the inner end, and projecting over and inclosing the collar. This was a slight improvement upon the common axle, but obviously did not exclude the sand from the surface of the wearing collar.

The "sand-band axle" of Asa Miller was another attempt to avoid the defect of the common axle. A loose collar was slipped over the square bar of the axle, and was pushed to a point within an eighth or a quarter of an inch of the wearing collar, thus leaving a chamber between the two collars. The second or loose collar was screwed into the wooden bed of the axle and was held firmly in position. A cast-iron circular band inclosed and covered both collars. This band was attached to the hub either by surrounding it or being driven into it. The design of the device was to form, by means of the two collars and the encompassing band, a "sand-box" which should collect and retain whatever dirt worked under the sand-band. The result was successful, although it made a somewhat clumsy hub, and the several parts could not easily be attached to each other with precision.

Steele's object was to improve upon the "half-patent axle" so as to prevent sand from wearing away the axle at its inner end. He added to the "half-patent axle," whose axle-box extended over the single solid collar, another and light solid collar, whereby a chamber was formed like that of Asa Miller, which collected and held the sand, and so prevented it from abrading the wearing surface of the collar. The device was both an actual and a commercial success, and remedied the defects of the different axles which have been described. The improvement consisted in adding to the half-patent axle the extra collar of Asa Miller, with whose invention Steele was familiar, and making it solid, like the ordinary wearing collar. This improvement would, very probably, have been formerly considered patentable, but since the decision in *Pennsylvania R. Co. v. Locomotive-engine Safety Truck Co.* 110 U. S. 490, S. C. 4 Sup. Ct. Rep. 220, illustrated by the decisions in *Collins Co. v. Coes*, 21 FED. REP. 38, and *Spill v. Celluloid Manuf'g Co.* Id. 631, it cannot be so regarded. The collar of the Asa Miller box became the collar of the Steele box, and was used for the same purpose, and with the same result, as in the Miller device, with no change in the manner of its application, except that it was made solid with the axle. When it is remembered that the wearing collar had also long been made in the same manner, this alteration was an obvious and ordinary improvement.

The bill is dismissed.

CELLULOID MANUF'G Co. and others v. Comstock and others.

(Circuit Court, D. Connecticut. February 21, 1885.)

PATENTS FOR INVENTIONS—CELLULOID COVERING FOR PIANO KEYS—INFRINGEMENT—PATENT No. 210,780.

Defendant covered piano keys in the following manner, after the service of the injunction granted in *Celluloid Manuf'g Co. v. Pratt*, 21 FED. REP. 313: Two strips of muslin were glued to the upper surface of a sheet of celluloid. The sheet having been turned over, was fed into a machine, the knife of which partially cut and severed successive keys of the proper width as the sheet progressed over the table of the machine. By pressure, which was applied successively to each partially severed key, each key was broken and entirely separated from its fellows, but not from the muslin, which adhered to the row of keys and kept them in place so that the row could be easily handled. Cement was then spread upon the under surface of the keys, and the whole row was laid upon the key-board at the same time and subjected to pressure, as when an uncut sheet is fastened to the board. *Held*, not an infringement and a violation of the injunction.

In Equity.

Frederic H. Betts, for plaintiffs.

John K. Beach and John S. Beach, for defendant.

SHIPMAN, J. This is a motion to punish the defendants for contempt in violating the injunction heretofore granted to compel them to file with the master an account of the key-boards which they had covered with celluloid since the service of the injunction. The opinion which was given upon the final hearing of the case described the invention and construed the patent. *Celluloid Manuf'g Co. v. Pratt*, 21 FED. REP. 313. Since the service of the injunction, the defendants cover their keys in the following manner: Two strips of muslin are glued to the upper service of a sheet of celluloid. The sheet having been turned over, is fed into a machine, the knife of which partially cuts and severs successive keys of the proper width as the sheet progresses over the table of the machine. By pressure, which is applied successively to each partially severed key, each key is broken and entirely separated from its fellows, but not from the muslin, which adheres to the row of keys and keeps them in place so that the row can be easily handled. Cement is then spread upon the under surface of the keys, and the whole row is laid upon the key-board at the same time, and subjected to pressure as when an uncut sheet is fastened to the board. The plaintiff insists that this row of keys, attached to each other by strips of muslin, is, practically, the "continuous strip or roll" of celluloid which is described and claimed in the patent, and that as the gist of the patent "lies in handling the covering for the whole, or a substantial portion of the whole, key-board as a single piece," the defendants still infringe.

If the plaintiff's definition of the invention was a complete one, their conclusion might follow; but the invention did not consist merely in the fact that the covering of the board is handled as a single piece.

It consisted, also, in the fact that it is a single piece when put upon and fastened to the key-board, and thereby it possesses advantages over detached and separate pieces, whether made of ivory or celluloid. The complainants' record is quite clear on this point. For example, the inventor endeavored to fasten separate celluloid keys in the same manner that ivory strips are secured to the wood, but was unsuccessful, because, as he testified, separate celluloid strips warped the wood of the keys in a series of short curves, which difficulty was prevented by the use of a continuous sheet. When the single sheet is cut into a series of strips for each key, before being cemented to the wood, the invention, as described and claimed in the patent, no longer exists; because, no matter how skillfully the separate strips are manipulated so as to be placed upon the board with ease, the invention was the continuous strip or roll, as contrasted with separate strips for each key.

The motion is denied.

WILLIAMS v. STOLZENBACH and others.

(Circuit Court, W. D. Pennsylvania. February 6, 1885.)

1. PATENTS FOR INVENTIONS—APPARATUS FOR OBTAINING AND WASHING SAND.

Letters patent No. 206,514, for an improvement in apparatus for obtaining and washing sand, granted July 30, 1878, to David C. Williams, construed, and held to be limited to a combination having as one of its elements a vessel of water in which the screen is immersed, and therefore not infringed by defendants' apparatus, the screen of which works in the unconfined water of the river.

2. SAME—CONSTRUCTION OF CLAIMS.

It is beyond the province of judicial construction to eliminate from a claim an explicitly declared constituent of a combination merely because it is in fact unnecessary in effecting the desired result.

In Equity.

D. F. Patterson, for complainant.

George H. Christy, for respondents.

ACHESON, J. The plaintiff's invention relates to apparatus for obtaining and washing sand, and, as described in his specification and illustrated by the accompanying drawings, consists of a cylindrical riddle or screen, D, "the lower portion of which is immersed in a vessel of water," C, through which riddle or screen and vessel flows a stream or currents of water, in combination with an ordinary dredging-boat having elevators for supplying the interior of the screen with unwashed sand, a receptacle, F, for receiving the washed sand, and elevators for removing it therefrom. As the screen rotates, the sand becomes separated from the coarser materials by the revolving movement, and passing through the meshes drops into the vessel, C, from which it is removed and thrown into the receptacle, F, by means of

wings or projecting longitudinal flanges attached to the outside of the screen. The specification states that the riddle or screen, D, in its "construction and operation," is substantially the same as that described in a previous patent, granted April 23, 1867, to David Furnier. That this is so, is evident upon comparing the two patents; and it may be added that in the Furnier apparatus the cylindrical screen is provided with exterior wings or longitudinal flanges like those above mentioned, and performing the same function. The vessel, C, and the receptacle, F, are partly sunk below the surface of the stream in which the dredging-boat is operating, and the inflowing supply of water to the vessel, C, (to take the place of that swept out of it with the washed sand) is obtained by means of openings or holes in the side of the vessel below the water-line. Of this feature of the apparatus the specification thus speaks:

"The riddle or screen, D, is placed in a vessel, C, into which is constantly flowing through openings, *x*, currents of water, whereby the lower portion of the riddle, D, is always immersed in water, and a current of water is constantly flowing through the riddle, thereby keeping the meshes of it clean."

There are four claims. The first is as follows:

"A screen or riddle immersed in a vessel of water, and through which is flowing a stream of water, in combination with an ordinary dredging-boat for supplying the said screen with unwashed sand, substantially as herein described, and for the purpose set forth."

The second claim is for the same combination, with the addition of elevators for supplying and charging into the interior of the screen unwashed sand. The third claim is for the same combination as the second, with the addition of a receptacle for receiving the washed sand and elevators for conveying it therefrom. In each of these claims occurs the language, "a cylindrical screen immersed in a vessel of water." The fourth claim is for the combination of the screen, D, the vessel, C, the receptacle, F, two elevators, and four designated chutes.

It is quite clear to me, from the descriptive portion of the specification, that the inventor regarded it as essential to the desired end that the water in which the screen rotates should be segregated by an inclosing vessel. The riddle or screen, he instructs us, is to be "*placed in a vessel into which is constantly flowing, through openings, *x*, currents of water,*" etc. He perhaps thought that unless the water was thus cut off from the body of the stream the sand would be washed out of the screen by the action of the natural current, or by reason of the agitation of the water. But with his conjectures we need not concern ourselves. It is enough that by his explicit language, "a riddle or screen immersed in a vessel of water," is a constituent of the several combinations claimed. *Tate v. Thomas*, 30 O. G. 345; S. C. 22 FED. REP. 660.

Now, indisputably, the defendants' screen is not immersed in a vessel of water, nor placed in any vessel whatsoever. On the contrary,

it rotates and performs its work in the open river. The defendants, therefore, do not use the plaintiff's patented invention, unless the immersion of the screen directly in the river is the same thing as its immersion in a vessel containing water let in from the river by means of the openings described in the plaintiff's specification, or other equivalent means. But who will affirm this? It is in vain to urge that, the use of a vessel being, in fact, unnecessary, the claims should be read as if they called broadly for the immersion of the screen in the water of the river. To eliminate what is a plainly declared element of a combination is beyond the province of judicial construction. *Water-meter Co. v. Desper*, 101 U. S. 332. Besides, from first to last, the specification contains no hint that the inclosing vessel could be dispensed with, and I think it manifest that it had not occurred to the inventor that the screen could successfully perform its work in the open stream. It is, indeed, true that underneath the defendants' screen there is a pan or vessel which catches the screened sand. Their screen, however, is not immersed or placed therein, but rotates and does its whole work above it, in the unconfined water of the river. The outside wings move therein, but they are no part of the screen, and their work is distinct from and follows the screening.

The prior state of the art here was such that the plaintiff's claims were necessarily very narrow. Dredging and sand-washing boats equipped with cylindrical screens, elevators to feed the screen, receptacles to hold the washed sand, and elevators to carry it away, were old. How much the plaintiff borrowed from Furnier we have already seen. Moreover, Furnier's first claim calls for a hollow screen revolving on an axis, with one portion always immersed in a vessel, through which a stream of water constantly flows from some convenient reservoir. Now, what more has the plaintiff done than devise his vessel, C, with sides raised above the water-line so as to embrace the screen, and provided with its water-supply openings? Within the restricted limits of his claims, his patent may well stand; but, as the defendants do not use the plaintiff's vessel, or any equivalent therefor, they do not infringe his rights.

Let a decree be drawn dismissing the plaintiff's bill, with costs.

FARMERS' FRIEND MANUF'G Co. v. CHALLENGE CORN-PLANTER Co.

(Circuit Court, W. D. Michigan, S. D. January 16, 1885.)

PATENTS FOR INVENTIONS—REISSUE No. 10,155—CORN-PLANTER.

Reissued letters patent No. 10,155, issued to the Farmers' Friend Manufacturing Company as assignee of Michael Runstetler, on July 11, 1882, is not for the same invention covered by the original letters, and is invalid.

In Equity.

Wood & Boyd and E. W. Withey, for complainant.

Stem & Peck and Edward Taggart, for defendant.

BAXTER, J. This is a bill to enjoin an alleged infringement of reissued letters patent No. 10,155, issued to the complainant, as assignee of Michael Runstetler, on July 11, 1882. We have not the time to enter upon a full discussion of the facts of the case, and hence will content ourselves with a simple announcement of the conclusion to which we have arrived on one question made and relied on by the defendant.

In a former suit, prosecuted by the complainant in this court against the Waite Manufacturing Company, for an alleged infringement of the same reissued letters patent, we rendered a decree in complainant's favor, affirming their validity, and ordered an account of the damages. This, of course, would be conclusive of this case on that point if the facts of the two cases were the same; but the defendant did not introduce in the former case any testimony in support of its defenses. The decree made therein was predicated upon the *prima facie* case made by the production of complainant's said reissued letters patent and proof of the alleged infringement; but here the defendant comes with full proof. Among other testimony, it has put in evidence a copy of the original letters patent, and insists that upon comparison thereof with the reissued letters patent it will appear that the latter is not for the same invention covered by the former.

The first claim of the original patent is in these words:

(1) In a corn-planter having the rear main frame mounted on supporting wheels, the front runner-frame hinged or pivoted to the main frame, and operated by an elevating and depressing lever pivoted to the main frame, having its front end slotted and connected to the runner-frame by a bolt passing through said slot, in combination with the shaft, A, and lifting hand-lever, D, rigidly attached to said shaft, for elevating, depressing, and controlling the runner-frame, substantially as herein set forth.

A reissue was applied for and obtained, in which the foregoing claim was expanded into the four following claims:

(1) In a corn-planter having the rear main frame mounted on supporting wheels and the front runner-frame hinged or pivoted to the main frame, the combination of a foot-treadle and a hand-lever adapted to be used in conjunction or independently for the purpose of elevating or depressing the runners, substantially as herein set forth. (2) In a corn-planter having the rear main frame mounted on supporting wheels and the front runner-frame hinged or

pivoted to the main frame, a foot-treadle for elevating or depressing the runner-frame, in combination with a hand lock-lever, the foot-treadle and hand-lever adapted to be used in conjunction for forcing and locking the runners into the ground or lifting and locking them out of the ground, substantially as herein set forth. (3) In a corn-planter having the rear main frame mounted on supporting wheels and the front runner-frame hinged or pivoted to the main frame, a foot-treadle for elevating or depressing the runner-frame, in combination with a hand-lever rigidly connected therewith, that either hand-lever or treadle may be used for forcing the runners into the ground or lifting them out of the ground, substantially as herein set forth. (4) The combination, in a corn-planter having the rear main frame mounted on supporting wheels and a front runner-frame hinged or pivoted to the main frame, of a foot-treadle for elevating the runner-frame, and a hand-lever for elevating or depressing the same, both arranged to move simultaneously when either is acted upon by an operator.

The foregoing first claim of the original patent ought, in view as well of its own terms as of the correspondence relating thereto, which passed between the office and the inventors' solicitors, shown by the file-wrapper, to be restricted to the specific combination therein described. This was all to which the inventor was entitled, (everything else having been anticipated by others.) Thus construed, the defendant's planter is not an infringement of the original patent. This was conceded by complainant's expert in his testimony and by counsel in the argument of the cause. But defendant's planter is, as they contend and as the court concedes, an infringement of the reissued patent. The reissue is not, as we think, for the same invention covered by the original letters, and is invalid. Complainant's bill will be dismissed, with costs.

THE EDITH GODDEN.

(District Court, S. D. New York. January 30, 1885.)

PERSONAL INJURIES — LIABILITY OF SHIP-OWNER TO SAILOR FOR INJURIES RECEIVED IN CONSEQUENCE OF INADEQUATE MACHINERY—MODERN APPLIANCES —MARITIME LAW AS DISTINGUISHED FROM THE MUNICIPAL.

Ship-owners, in furnishing modern appliances for the convenience of the ship, such as a steam-winch, in connection with a derrick, for loading and unloading, are held to the strictest rule of diligence and care as to the sufficiency of such appliances. If inadequate for the purpose designed, or to which they are put by authority of the owners, the latter will be held liable to a seaman injured by reason of such inadequacy. The ancient maritime rule, limiting a seaman's compensation to wages and expenses of cure, should not be extended to these modern conditions and appliances, not strictly belonging to the navigation of the ship, for which these limitations were never designed; but, as regards accidents from such causes, the analogies of the municipal law should be followed. On the steamer E. G. a derrick was used, in connection with a steam-winch, for the purpose of loading and unloading. At Port Maria, Jamaica, a fruit boat, taken aboard the day previous, being an old long-boat, and weighing about $1\frac{1}{2}$ tons, was being lowered away by this means, but as it was swung over the rail, the hook which held the derrick in place broke, and the boom

of the derrick fell upon the deck. In falling, it struck the libellant upon the shoulder, causing severe injuries. The same appliance had been used the day before, in hoisting the boat aboard, with safety, but in a quiet harbor. Port Maria is an open roadstead, and on this occasion there was considerable rolling and lurching of the ship. There was no latent defect in the hook that broke. Held, that the owner was bound to furnish appliances adequate for the place and occasion where used, and these being, in fact, inadequate, and never tested for sufficiency under the circumstances of a rolling sea, held negligence in the owners, and that the vessel was liable for the damages; and \$1,500 were awarded to the libellant.

In Admiralty. Action for personal injuries.

H. J. Schenck, for libellant.

H. Putnam, for claimant.

Brown, J. On the nineteenth of January, 1883, the libellant, being a seaman on the steam-ship Edith Godden, was ordered, with others, to help hoist and lower away from the steam-ship, while lying at Port Maria, Jamaica, a fruit boat, formerly a long-boat, designed to be used for the lading of cargo there. A derrick was made use of in connection with a steam-winch, and the boom of the derrick was held in place by means of a block, through which ran double ropes to the foretop-mast, and the block was attached by an iron hook running inside of an iron collar which surrounded the derrick boom. After the boat had been raised and got over the ship's rail, the hook that held the derrick in place broke, and the boom fell down upon the deck, across the hatch and the rail. In falling it struck the libellant upon the shoulder, causing severe injuries, for which this libel was filed.

The evidence varies considerably, both as to the weight of the fruit boat, and as to the weights that the derrick was designed to sustain. There was a brake, designed to be applied by the foot, attached to the winch; but it was out of order. The fruit boat had been taken on board the day before by the use of the same derrick, winch, and tackle, in a quiet harbor. Port Maria is an open, unsheltered roadstead; and when the boat was lowered away, there was considerable rolling and lurching of the ship. Considerable evidence for the claimants was offered to the effect that the brake, if in order, would not be proper to be used in lowering weights so heavy as this boat, which weighed somewhere from one to two tons; that the only proper mode, and the mode ordinarily in use, was by reversing the steam-winch, and managing the steam-valve by hand. In behalf of the libellants, the evidence of some experts was to the effect that the reversing of the steam-winch, and managing it by hand, was a somewhat delicate operation, that required care to prevent sudden jerks; and that special difficulty was likely to arise in this way where there was any rolling or lurching of the ship. An examination of the hook showed no defects in the iron at the place of breakage, and no apparent insufficiency. In this respect the case differs from that of *The Nederland*, 7 Fed. Rep. 926. The only cause for breakage that could be assigned was either too great a weight, or some sudden strain. The weight of proof indicates

that the hook broke at the time when the order was given by the mate to reverse the winch, when there was a lurch of the vessel.

I cannot doubt that the real cause of this accident was in the overweight, or strain incident to the use of this derrick and winch, in lowering so heavy a weight in a rolling sea. It is not a case of any latent defect; for the testimony of the experts negatives any such cause. Nor is there proof of any definite act of negligence on the part of the men that were using or handling the winch or the derrick. The machinery must therefore be deemed itself insufficient for the use to which it was applied, under the particular circumstances where it was thus used. Upon the evidence it must be inferred, moreover, that the owners were responsible for the use of this machinery under the circumstances that caused it to break and injure the libellant. The fruit boat belonged to the owners of the ship. It had been taken on board at another port in Jamaica, for the purpose of being used at Port Maria, and this was clearly done under the direction of the owners or their agents, and for their benefit. In providing that this boat should be taken on board the steam-ship, and then launched at Port Maria under the disadvantages of a rough sea, to which the latter port was exposed, I think the owners must be held answerable for any insufficiency of the derrick for the use to which it was there necessarily subjected under the more hazardous circumstances at Port Maria. Their legal duty, by the municipal law, was to exercise due care in providing machinery adequate and proper for the use to which it was to be applied, and to maintain it in like condition. *Kain v. Smith*, 80 N. Y. 458, 467; *Devlin v. Smith*, 89 N. Y. 470; *The Rheola*, 19 FED. REP. 926.

This derrick and winch do not appear to have been designed for use under circumstances of sudden strain and jerks, or to have been tested in such circumstances. In providing that the fruit boat should be launched at Port Maria by means of this derrick and winch, the owners, or their agents who directed it, were answerable for their insufficiency in the absence of any reasonable tests of ability to undergo such strains. The libellant had no means of knowing their strength, and he had no option but to obey orders. A seaman on board ship has not the privilege of using his own judgment, or of quitting the ship's service if he apprehends danger, like an ordinary workman on shore. If owners cannot be held as insurers of the appliances furnished to the ship for the safety of seamen, they ought, at least, to be held to the strictest rule of diligence and care. As there was no negligent act shown on the part of those using the derrick that caused it to break, and no latent defects, I must ascribe the breakage, as I have said, to the insufficiency of the derrick itself for the strain to which it was subjected when used in a rolling sea in connection with a steam-winch, and hold the owners responsible therefor, in the absence of any previous tests of fitness to undergo such sudden strains as it was liable to under such circumstances.

For the claimants it is urged that by the maritime law the liability of the ship, in case of injury to seamen, extends only to proper care and nursing, and the expenses of cure, so far as cure is possible; and this court has so held in regard to accidents arising in the ordinary course of navigation. *The City of Alexandria*, 17 FED. REP. 390. In that case, however, the proper equipment and outfit of the ship were assumed. Pages 393, 396. There is no question that in modern maritime law the owners are responsible for due care and diligence in the proper equipment of the vessel for the contingencies of the voyage. *Halverson v. Nisen*, 3 Sawy. 562. See *The Explorer*, 20 FED. REP. 135; *The Wanderer*, Id. 140. In the use of modern appliances, such as a steam-winch in connection with a derrick, as in this case, not for the prosecution of her ordinary navigation, but for the conveniences of the ship in loading or unloading, it is more reasonable and equitable to apply the analogies of the municipal law in regard to the obligation of owners and masters, rather than to extend the limited rule of responsibility under the ancient maritime law to these new, modern conditions, for which those limitations were never designed. And, in applying the analogies of the municipal law, the helplessness of seamen, and the imperative duty of obedience, as I have above said, ought to impose upon masters and owners the highest rule of diligence and care in ascertaining the sufficiency of all such modern appliances for the exigencies to which they are to be subjected. As that was not done in this case, the breaking of the derrick through its own insufficiency must be deemed evidence of negligence on their part, which equitably imposes the consequences upon them, rather than upon the seaman, who is an innocent sufferer through their want of proper care.

The injuries to the libellant were severe. He was partially paralyzed; but, after being cured so far as possible, he is permanently disabled from pursuing his former occupations, though able to follow lighter pursuits upon land. On the whole, I think \$1,500 will be a proper allowance by way of damages, with costs.

RILEY v. ALLEN and others.

(District Court, W. D. Tennessee. February 21, 1885.)

1. ADMIRALTY—PERSONAL INJURY—BEATING A DECK HAND OR ROUSTABOUT.

The officers of a steam-boat are liable for injuries caused by severely beating a deck hand or roustabout.

2. SAME SUBJECT—DISCHARGE—IMPROPER TIME AND PLACE.

A deck hand cannot, for mere inefficiency, be driven from a steam-boat at an inhospitable place on a dark, cold night, whereby he was subjected to unnecessary suffering and discomfort, without rendering the officers liable to damages for such treatment.

In Admiralty.

W. S. Flippin, for libelant.

H. C. Warinner, for defendants.

HAMMOND, J. This is a libel *in personam* against the officers and owners of a steam-boat for personal injuries. The plaintiff is a "roustabout,"—a name by which negro deck hands on the steamers plying the Mississippi river and its tributaries are known. He shipped on the *Rene Macready* for a trip up the St. Francis river. He alleges and proves by his own testimony and that of three other roustabouts that the mate beat him with a stick or club, severely bruising his arm and disabling him for several weeks. The mate swears he did not strike him at all, and so does the captain, who saw the occurrence. Another witness not connected with the boat also testifies that the mate did not strike the libelant. There is no doubt, however, that on a cold night in January, when the ground was covered with water, this man was paid off, discharged, and made to leave the boat at a place where there was no accommodation for him; that, being wet from rain and mud, he had to go to a negro cabin some distance away, where he stayed all night, and the next morning was compelled to walk through the overflowed swamp some five miles to a railroad, where he walked the track about thirty miles to his home in Memphis. The cause assigned for his discharge is that "he was no account;" that is, did not work satisfactorily. He proves by himself and one of his witnesses that he begged to be allowed to stay on the boat, and offered to pay his way back to Memphis, which was refused. This again is denied by the officers, who say that one Collins offered to hire him, and they thought he had done or would do so; but Collins is not produced to prove this, and it is denied by the libelant and his witnesses.

A very earnest argument is made by counsel for defendants to the effect that these roustabouts are a very degraded class of laborers, and so vicious in their instincts that they are uninfluenced by any ordinary consideration that would impel a man to do his work most efficiently; and that it would imperil the interests of commerce and obstruct the navigation of this river to apply to complaints like this the customary rules of law that govern the contract of sea-going mariners. It is urged that nothing but the severest compulsion will make them work; that they understand this, and engage in the service with a knowledge of the fact that they may be subjected to rough measures to prevent them from shirking their labor under circumstances where inefficiency is disastrous to their employers. There is a good deal of force in this, but it is the old-time argument in favor of flogging seamen and soldiers, and cannot override the humane policy of our statute which abolishes it in the army, in the navy, and "on board vessels of commerce." Rev. St. § 4611. It is no more lawful to flog a "roustabout" than it is to so discipline a common seaman, and it never was lawful to beat and wound them with sticks and clubs, for which the

officers are liable, both civilly and criminally. Rev. St. § 5347; *U. S. v. Collins*, 2 Curt. 194. It is often done with brutish violence. I have seen them come about this court-house with a vague idea that in some way they were under the protection of the officers of the United States, and having the marks of violence upon them showing how cruelly they had been beaten. They have been sent to attorneys, but in some way it has been arranged so that this court has never had the opportunity of imposing the penalty of damages for such brutality. The ordinary remedies of withholding wages, discharging for misconduct, putting in confinement or in irons, and the like, must suffice as methods of discipline for inefficiency, if the penalties of the statutes by criminal prosecution for disobedience of orders do not apply. Certainly, beating cannot be sanctioned by the courts. The beating is not satisfactorily proven in this case, and the testimony of the only disinterested witness must turn the scale against the libellant on that point.

But these officers had no right to discharge this man at the place they did, late at night, and under circumstances which show that it was imposing upon him unnecessary suffering. His wages were paid him, but they might have been withheld, if it was just to do that, or used to pay for his shelter on the boat. I do not decide that he could not be discharged at all until the return of the boat, and express no opinion as to that; but he should not, for mere inefficient work, have been driven from the boat on a dark, cold, and wet night; at the time and place where he was compelled to go ashore. Common hospitality and humanity should have prevented this, and the admiralty law forbids it. The proper and humane care of even inefficient seamen is the duty of every master, and whatever he may lawfully do must be done with due consideration for this principle. 1 Conkl. Adm. 429-442.

It is not difficult to determine the measure of damages in this case. If severe beating had been proved, the court would yield to the demand for not less than \$100; but it is disproved. He had been paid his wages, and might have come home on the cars, but chose to walk when he reached the railroad. I think \$30 amply sufficient to compensate the libellant, and emphasize the determination of this court to insist on humane treatment even of "roustabouts." Decree accordingly.

WOOSTER v. HANDY. (No. 1.)

SAME v. SINGER MANUF'G Co. OF NEW YORK. (No. 2.)

SAME v. HOWE MACHINE Co. (No. 3.)

SAME v. WILLCOX & GIBBS SEWING-MACHINE Co. (No. 4.)

SAME v. DOMESTIC SEWING-MACHINE Co., impleaded, etc. (No. 5.) .

SAME v. SCHENCK, impleaded, etc. (No. 6.)

SAME v. SINGER MANUF'G Co. OF NEW JERSEY. (No. 7.)

SAME v. BARKER. (No. 8.)

SAME v. THORNTON and others. (No. 9.)

SAME v. BLAKE and others, impleaded, etc. (No. 10.)

(Circuit Court, S. D. New York. February 16, 1885.)

1. EQUITY PRACTICE—COSTS—FINAL HEARING IN EQUITY OR ADMIRALTY—SECTION 824, REV. ST.

To constitute "a final hearing in equity or admiralty," within the meaning of section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court, in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libelant has made out the case stated by him in his bill or libel as the ground for the permanent relief which his pleading seeks, on such proofs as the parties place before the court, be the case one of *pro confesso*, or bill or libel and answer, or pleadings alone, or pleadings and proofs.

2. SAME—SEVERAL TRIALS—DOCKET FEE.

The statute does not forbid the allowance of a docket fee on or for each trial before a jury, where there is a verdict, or on or for each final hearing in equity or admiralty, if there are two or more final hearings, such as are above defined, in the same cause.

3. SAME—DEPOSITIONS ADMITTED IN EVIDENCE BY STIPULATION—TAXABLE FEES.

Where, on the hearing of one of several suits heard at the same time, brought by the same plaintiff against different defendants, for the infringement of the same patent, the depositions of a number of witnesses, taken in others of said suits, are admitted in evidence by virtue of a stipulation that all the evidence taken for the final hearing on both sides, in the other suits, may be read on the final hearing herein with the same force and effect as if taken herein, a solicitor's fee of \$2.50 for each deposition in each one of the cases is not taxable.

4. SAME—COPIES OF PAPERS.

Copies of papers obtained for use on interlocutory or preliminary or incidental motions or hearings are not obtained for use on trials, within the meaning of section 983.

5. SAME—TRAVELING EXPENSES OF MESSENGERS AND ATTORNEYS.

The traveling expenses of attorneys to take evidence and attend court, and the expenses of messengers, are no part of taxable costs. Such expenses were never taxable before or since the act of 1853.

6. SAME—MACHINE EXHIBITS.

The expense of copies of models in the patent-office, properly procured for use as a part of the evidence in the suit, may be allowed for as part of the taxable costs; but the expense of other models and machines are not allowed to be so taxed.

7. SAME—PHOTOLITHOGRAPHIC EXHIBITS.

Photolithographic exhibits, not being drawings from the patent-office, but sketches introduced by witnesses in giving their evidence, fall under the rule as to machine exhibits, and are not taxable as costs.

8. SAME—WITNESSES' FEES NOT PAID.

Where witnesses are paid in one or more cases, and not in others, the evidence is strong that they are never to be paid; especially where the lapse of time is great between the rendering of the service and the taxation.

9. SAME—DEPOSITIONS OF WITNESSES SWORN IN MORE CASES THAN ONE.

Where the deposition of a witness was taken and entitled in several suits, he being sworn in each, but his deposition was written down only once, and there was no agreement that the solicitor's fee of \$2.50 should be taxed but once for the group of cases, such fee is taxable for the deposition, in each case.

10. SAME—FEES PAID THE SAME WITNESS IN MORE THAN ONE CASE.

In the absence of any rule of court, or special order, or stipulation of parties, a witness is entitled under section 848 to his fee for each day's attendance in court in each suit in which he attends.

11. SAME—CERTIFIED COPIES OF PAPERS PUT IN EVIDENCE.

Where, under section 983, copies of papers necessarily obtained for use are put in evidence, and no order is made rejecting them as evidence, it is the duty of the clerk to allow, on taxation, the disbursements paid for the various copies put in evidence and forming part of the record for final hearing.

12. SAME—INCOMPETENT AND IMMATERIAL TESTIMONY.

Where, upon an appeal from the taxation of costs, a party for the first time applies to the court to declare certain depositions to be incompetent and immaterial, it is a sufficient ground for denying the application that the party did not, at or before the final hearing, or before the taxation of costs, move to strike out the evidence in question.

In Equity.

Henry S. Hoyt and Frederic H. Betts, for plaintiff.

W. H. L. Lee, B. F. Lee, and John Dane, Jr., for defendants.

BLATCHFORD, Justice. In suits Nos. 1, 9, and 10, hearings were had on pleadings and proofs, and decrees directed for the plaintiff, in April, 1881. *Wooster v. Blake*, 8 FED. REP. 429. Afterwards, on the application of the defendants, those cases were reheard, because of decisions made by the supreme court in January, 1882, and the bills were dismissed in July, 1884. *Wooster v. Handy*, 21 FED. REP. 51. At the same time, after hearings on pleadings and proofs, the bills were dismissed in the other seven cases. *Wooster v. Howe Machine Co.* 21 FED. REP. 67.

The questions now to be considered arise on appeals by both parties from the taxation by the clerk of the defendants' bills of costs. The amounts of the bills in the several cases, as offered for taxation, the amounts disallowed, and the amounts taxed, were as follows:

SUITS.	OFFERED.	DISALLOWED.	TAXED.
No. 1,	\$1,555 29	\$ 486 40	\$1,068 89
No. 2,	2,707 46	340 19	2,367 27
No. 3,	261 86	24 25	237 61
No. 4,	203 42	89 25	114 17
No. 5,	237 92	25 50	212 42
No. 6,	249 67	27 25	222 42
No. 7,	168 52	122 50	46 02
No. 8,	157 57	115 00	42 57
No. 9,	190 63	38 74	151 89
No. 10,	160 27	28 35	131 92
	\$5,892 61	\$1,297 43	\$4,595 18

The questions to be considered arise mainly under the statutory provisions in regard to fees and costs. The fee bill of February 26, 1853, (10 St. at Large, 161,) provided as follows:

Section 1. "In lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, * * * witnesses * * * in the several states, the following and no other compensation shall be taxed and allowed. But this act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.

"FEES OF ATTORNEYS, SOLICITORS, AND PROCTORS. In a trial before a jury in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars. Provided, that in cases in admiralty and maritime jurisdiction, where the libellant shall recover less than fifty dollars, the docket fee of the proctor shall be but ten dollars; in cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued; for *scire facias*, and other proceedings in recognizances, five dollars; for each deposition taken and admitted as evidence in the cause, two dollars and fifty cents."

"Sec. 3. * * * WITNESSES' FEES. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for traveling from his place of residence to said place of trial or hearing, and five cents per mile for returning. When a witness is subpoenaed in more than one cause between the same parties in different suits at the same court, but one travel fee and one *per diem* compensation shall be allowed for attendance, to be taxed in the first case disposed of, and '*per diem*' only in the other causes, to be taxed from that time in each case, in the order in which they may be disposed of. * * * The bill of fees of clerk, marshal, and attorneys, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. * * * That before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove, by his own oath, or some other person having a knowledge of the facts, to be attached to such bill and filed therewith, that the services charged therein have been actually and necessarily performed as therein stated."

The foregoing provisions appear in the following form in the Revised Statutes:

"Sec. 823. The following, and no other, compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to * * * witnesses * * * in the several states and territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.

"FEES OF ATTORNEYS, SOLICITORS, AND PROCTORS. Sec. 824. On a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: provided, that in

cases of admiralty and maritime jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars. In cases at law, when judgment is rendered without a jury, ten dollars. In cases at law, when the cause is discontinued, five dollars. For *scire facias*, and other proceedings on recognizances, five dollars. For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents."

"WITNESSES' FEES. Sec. 848. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the *per diem* attendance fee alone shall be taxed in the other cases in the order in which they are disposed of."

"Sec. 983. The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party."

"Sec. 984. Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove by his own oath, or that of some other person having a knowledge of the facts, to be attached to such bill and filed therewith, that the services charged therein have been actually and necessarily performed as therein stated."

The objections taken by the defendants to the disallowance of items which were disallowed will first be considered.

1. *Docket fees.* In suits Nos. 1, 9 and 10, a solicitor's docket fee in each case was claimed, of \$20, for each one of the two hearings, but only one docket fee of \$20 was taxed in each one of the three cases. It is contended, for the plaintiff, that only one docket fee of \$20 in each one of the three cases was taxable; that the first hearing was not the "final hearing" referred to in the statute; that the docket fee of \$20 is only taxable once in a suit, although there is more than one trial or more than one hearing of the case; that a final hearing in an equity suit is the hearing pursuant to which the final decree is entered; and that there can be but one final hearing of a cause in the same court. The words of section 824 are, "on a final hearing in equity or admiralty." The same words were used in section 1 of the act of 1853. The words "final hearing" had a recognized meaning, in the practice and procedure of courts, in 1853. Those words are found in the removal act of July 27, 1866, (14 St. at Large, 306,) in the provision for a removal by a petition filed "at any time before the trial or final hearing of the cause," which provision is reproduced in that language in subdivision 2 of section 639 of the Revised Statutes. They are also found in the removal act of March 2, 1867, (14 St. at Large, 558,) in the provision for a removal by a petition filed "at any time before the final hearing or trial of the suit," which provision is reproduced in subdivision 3 of section 639

of the Revised Statutes, in this language: "at any time before the trial or final hearing of the suit."

In reference to this act of 1867 it was said by Chief Justice WAITE, in *Vannevar v. Bryant*, 21 Wall. 41, 43: "The act authorizes the petition for removal to be filed 'at any time before the final hearing or trial of the suit.' The hearing or trial here referred to is the examination of the facts in issue. 'Hearing' applies to suits in chancery and 'trial' to actions at law." In the same case, *sub nom. Bryant v. Rich*, 106 Mass. 180, 192, it was said by Justice GRAY, that the words "final hearing or trial," in the act of 1867, would seem to be equivalent in meaning to the words "trial or final hearing," in the act of 1866. In reference to these words in the acts of 1866 and 1867, it is said by Judge DILLON, in his work on the Removal of Causes, (3d Ed. c. 15, § 59, p. 73,) as the result of numerous authorities cited: "Under this language, the petition for the removal *may*, it is certain, be made at any time before entering upon the final trial, or the hearing on the merits."

In *Doughty v. West, Bradley & Cary Manuf'g Co.* 8 Blatchf. C. C. 107, it was said by WOODRUFF, J., in 1870, in reference to the allowance of a docket fee under section 1 of the act of 1853:

"'Trial' and 'final hearing' have well-known definite meanings in the law, and they are used in this statute in that well-known sense. 'Trial' is used to describe the process of determining the issues in an action at law; and 'final hearing,' the submission of the case, for a determination thereof, upon the pleadings, or pleadings and proofs, or otherwise, so that the case may be finally disposed of."

The distinction between interlocutory applications and final hearings is a fundamental one in equity proceedings; and, when the expression "final hearing" is used in reference to an equity suit, it is used in contradistinction to an interlocutory application.

In 2 Daniell, Ch. Pr. c. 35, § 1, (4th Amer. Ed. 1587,) it is said:

"An interlocutory application is a request made to the court, or to a judge in chambers, for its interference in a matter arising in the progress of a cause or proceeding; and it may either relate to the process of the court, or to the protection of the property in litigation *pendente lite*, or to any matter upon which the interference of the court or judge is required before or in consequence of a decree or order."

This distinction is recognized in the rules in equity prescribed by the supreme court. Rule 1 is as follows:

"The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to hearing of all causes upon their merits."

This rule went into effect August 1, 1842, and has been in force ever since. So, in rule 29 of the rules in admiralty prescribed by the supreme court, it is provided that a default in answering a libel may be set aside, and an answer allowed, "at any time before the final

hearing and decree." This rule has been in force since September 1, 1845.

In *Dedekam v. Vose*, 3 Blatchf. C. C. 77, in 1853, in this court, where a decree dismissing a libel in admiralty had been affirmed, it was held by Mr. Justice NELSON and Judge BETTS, that the proctor could not have a docket fee of \$20 for each one of two terms at which the cause was on the calendar, but could have one docket fee.

In *Hayford v. Griffith*, Id. 79, in 1853, in this court, where an appeal in admiralty was dismissed by the court on motion, before hearing, for irregularity, it was held by Mr. Justice NELSON that the docket fee was allowable, because the cause was on the calendar for hearing and was finally disposed of.

In *Dedekam v. Vose*, Id. 153, in 1853, in this court, where, after a decree in admiralty had been affirmed, there was an order by default against stipulators, it was held by Judge BETTS that a docket fee could not be charged therefor, as a final hearing, because it was an interlocutory or collateral proceeding by motion.

In *Doughty v. West, Bradley & Cary Manuf'g Co.* 8 Blatchf. C. C. 107, in 1870, in this court, there was a reference to a master growing out of a motion for an injunction before final hearing, and it was held by Judge WOODRUFF that a docket fee for the reference, as a trial or final hearing, was not taxable.

In *Goodyear Dental Vulcanite Co. v. Osgood*, 2 Ban. & A. 529, in 1878, in the circuit court for the district of Massachusetts, there were, in each of two equity cases, a bill, an answer, and a replication, and each case was dismissed by an order of the court, on the plaintiff's motion, there having previously been an interlocutory decree in each suit, which substantially decided the merits of the controversy; and it was held by Judge SHERLEY that a docket fee of \$20 was taxable in each of the two cases. He said:

"In the taxation of costs, 'final hearing' is to be considered as the submission of a cause in equity for the determination of the court, so that the case may be finally disposed of upon bill and answer, or bill, answer and replication, or upon pleadings and proofs, or otherwise, after the case is at issue."

In *The Bay City*, 3 FED. REP. 47, in 1880, in the trial of a suit in admiralty in the district court for the Eastern district of Michigan, evidence was given on both sides, and leave was granted to the libellant to give further proof, the court having intimated an opinion that he had not made out a case. He then discontinued the suit. Judge BROWN held that the docket fee was taxable, and was not dependent on a judgment or decree, but was taxable on a trial or final hearing.

In *Strafer v. Carr*, 6 FED. REP. 466, in 1881, in the district court for the Southern district of Ohio, there were two disagreements of juries, and then the plaintiff dismissed the case. It was held by Judge SWING that no docket fee of \$20 was taxable, but only a discontinuance fee of \$5.

In *Schmieder v. Barney*, 19 Blatchf. C. C. 143, S. C. 7 FED. REP.

451, in 1881, in this court, there were three trials before a jury; *first*, the plaintiff had a verdict, and the defendant obtained a new trial; *second*, the defendant had a verdict, and the plaintiff obtained a new trial; *third*, the defendant had a verdict. It was held by Judge BLATCHFORD that each of the three trials was a complete trial, and that the defendant was entitled to tax three docket fees of \$20 each.

In *Coy v. Perkins*, 13 FED. REP. 111, in 1882, in the circuit court for the district of Massachusetts, there was a demurrer to a bill in equity, and the plaintiff, without notice to the defendant, or hearing or consideration of the case by the court, entered an order as of course, dismissing the bill. It was held by Mr. Justice GRAY and Judge LOWELL (Judge NELSON concurring) that the docket fee was not taxable. Mr. Justice GRAY says, referring to sections 823 and 824:

"We are of opinion that, upon the face of the statute, the intention of the legislature is manifest, that it is only where some question of law or fact, involved in or leading to the final disposition actually made of the case, has been submitted, or at least presented, to the consideration of the court, that there can be said to have been a final hearing which warrants the taxation of a solicitor's or proctor's fee of \$20; as, for instance, where the court, on motion and argument, dismisses for irregularity an appeal from the district court, as in the case before Mr. Justice NELSON, of *Hayford v. Griffith*, 3 Blatchf. C. C. 79, or where the plaintiff discontinues after the court has substantially decided the merits of the case, either in an opinion expressed at the hearing upon the merits, as in the case of *The Bay City*, before Judge BROWN, (3 FED. REP. 47,) or by a previous interlocutory decree, as in *Goodyear Dental Vulcanite Co. v. Osgood*, decided by Judge SHEPLEY in February, 1878."

In *Yale Lock Manuf'g Co. v. Colwin*, 21 Blatchf. C. C. 168, S. C. 14 FED. REP. 269, in 1882, in this court, where a suit in equity was voluntarily discontinued by the plaintiff, without any hearing or decision by the court, Judge WHEELER held that the docket fee was not taxable.

In *The Alert*, 15 FED. REP. 620, in 1883, in the district court for the Eastern district of New York, a vessel was in custody, in an admiralty suit *in rem*, and the case was entered on the admiralty docket. An order was afterwards made by the court dismissing the case, and discharging the vessel from custody, on payment of costs, founded on a consent of the libelant that the cause be discontinued on payment of the amount claimed, and the libelant's costs. Judge BENEDICT held that, as an order of court was necessary to obtain the release of the vessel and to cancel the libelant's stipulations, the hearing on the motion to that effect was a final hearing, and the docket fee was taxable.

In *Huntress v. Town of Epsom*, 15 FED. REP. 732, in 1883, in the circuit court for the district of New Hampshire, there was a disagreement of one jury, and afterwards a verdict by another jury. Judge CLARK held that only one docket fee of \$20 could be allowed.

In *Goodyear v. Sawyer*, 17 FED. REP. 2, in 1883, in the circuit court for the Western district of Tennessee, in six suits in equity, Judge

HAMMOND held that the docket fee was taxable where, after a cause was set on the hearing docket, it was dismissed by an order of the court, either generally or without prejudice, on motion of the plaintiff; and also where, after a decree against the defendant for an injunction and an account, and for costs, the cause was dismissed by the court on motion of the plaintiff. There were answers in all the cases, and replications in two, but no replications in the others.

In *Andrews v. Cole*, 20 FED. REP. 410, in 1884, in this court, in a suit in equity, there was an order *pro confesso*, followed by a final decree. It was held by Judge WALLACE that there had been a final hearing, and that a docket fee was taxable, because a final decree after an order *pro confesso* was not a matter of course.

The conclusion from the considerations above stated, supported as they appear to be by all the cases cited, except, perhaps, that of *Goodyear v. Sawyer*, is that to constitute "a final hearing in equity or admiralty," within the meaning of section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in his bill or libel as the ground for the permanent relief which his pleading seeks, on such proofs as the parties place before the court, be the case one of *pro confesso*, or bill or libel and answer, or pleadings alone, or pleadings and proofs. Nor does it detract from the force of this conclusion, that what is called an interlocutory decree, as distinguished from a final decree, is often entered as the result of a decision on a final hearing. In 2 Daniell, Ch. Pr. c. 26, § 1, (4th Amer. Ed.) 986, it is said:

"A decree is a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit, according to equity and good conscience. It is either interlocutory or final. An interlocutory decree is when the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing."

The docket fee is given by section 824 as a fee to the solicitor or proctor "on" the final hearing. If there is such a final hearing as is above defined, the fee is taxable, as between party and party, in behalf of the party to whom the costs of the cause are awarded. Nor is there anything in the statute which forbids the allowance of a docket fee on or for each trial before a jury where there is a verdict, or on or for each final hearing in equity or admiralty, if there are two or more final hearings, such as are above defined, in the same cause. A new trial granted after verdict is as complete a trial, if there is a verdict in it, as was the first trial; and a rehearing or second hearing, such as was had in suits Nos. 1, 9, and 10, after a decision was rendered in them, is as complete a final hearing as was the first one.

I am, therefore, of opinion that the second \$20 docket fee, in each of the three cases so reheard, must be allowed.

2. *Depositions admitted in evidence by stipulation.* There were, in each one of suits Nos. 2, 3, 4, 5, 6, 7, and 8, depositions admitted in evidence, by stipulation or order, which were not taken in the case in which they were so admitted. They number in all 150 depositions, and the fees for them, at \$2.50 each, are \$375. Those fees were disallowed on taxation. In suits Nos. 2, 3, 5, and 6 there was a stipulation that the depositions of two persons, taken in suits Nos. 1, 9, and 10, might be put in evidence by the defendants, in suits Nos. 2, 3, 5, and 6, "with the same force and effect as if" those two persons "were personally examined herein and testified as they have testified in said depositions;" and that the depositions of two other persons, theretofore taken in suits Nos. 1, 9, and 10, might "be read upon the final hearing," in suits Nos. 2, 3, 5, and 6, "with the same force and effect as if duly taken," in suits Nos. 2, 3, 5, and 6, "on the part of complainant." In suits Nos. 4 and 5 there was a stipulation that all the evidence taken in suit No. 3 "be admitted as evidence" in suits Nos. 4 and 5, "subject to all objections entered in the record" in suit No. 3, "with the same force and effect as if said evidence had been adduced" in suits Nos. 4 and 5; and that the evidence of two persons, theretofore taken in suit No. 10, "be admitted as evidence" in suit No. 5. In suit No. 6 there was a stipulation that the deposition of one person, taken in suit No. 3, be considered as taken in suit No. 6, "for the purposes thereof." In suit No. 7 an order was made, on consent of both parties, that all of the evidence theretofore taken on behalf of either party, in suits Nos. 2, 3, and 4, "be treated as evidence" in suit No. 7, on behalf of the party "who introduced and took the same" in suits Nos. 2, 3, and 4, "with the same effect (except on question of costs) as if duly taken" in suit No. 7. In suit No. 8 an order was made, on consent of both parties, that the proofs theretofore taken in suits Nos. 2, 3, 4, and 7 "be admitted as evidence for final hearing," in suit No. 8.

The defendants contend that, by these stipulations in the suits other than No. 7, it was agreed that the depositions should be treated in all respects as if taken in the respective suits into which they were admitted; that, independently of such agreement, the fee was taxable in all the cases in which the depositions were admitted in evidence; and that there is nothing in the stipulation in suit No. 7 which varies that rule.

In *Dedekam v. Vose*, 3 Blatchf. C. C. 77, in 1853, in this court, it was held by Mr. Justice NELSON and Judge BETTS, in an appeal in admiralty, that the fee of \$2.50 could not be taxed for a deposition taken in the district court and read in evidence in this court, at the hearing, from the apostles.

In *Stimpson v. Brooks*, Id. 456, in 1856, in this court, it was held by Judge BETTS that the fee was not taxable for a deposition taken and admitted as evidence on the hearing of a motion for a preliminary injunction.

In *Troy Iron & Nail Factory v. Corning*, 7 Blatchf. C. C. 16, in 1869, in the circuit court for the Northern district of New York, it was held by Mr. Justice NELSON that the word "deposition," in the act of 1853, did not include oral testimony taken in court or before a master, and applied only to a deposition given in evidence on the trial of a case at common law, and to one read at the hearing of a suit in equity.

In *Jerman v. Stewart*, 12 FED. REP. 271, in 1882, in the circuit court for the Western district of Tennessee, it was stipulated between the parties that depositions theretofore taken in a suit in a court of the state might "be read and used in evidence on the trial" of the suit in the circuit court. Judge HAMMOND held that the fee of two dollars and fifty cents for each of them was taxable, on the ground that, under section 824, it was not necessary that the depositions should be formally taken, but it was sufficient if they were taken in any way and admitted in evidence; that the depositions stood, in all respects, as if taken in the usual way, except that the cost of retaking was saved; that the fee of two dollars and fifty cents was not a part of the cost of taking the deposition, but, like the docket fee, was an allowance to the attorney, as taxable costs, for his professional services in the case; and that, unless the agreement of the parties waived it, it was as much taxable as any other costs.

In *Green v. French*, 5 N. J. Law J. 228, in 1882, in the circuit court for the district of New Jersey, there was a stipulation that the testimony taken in the case should be used in 13 other cases. Under the stipulation, 95 depositions taken and admitted in evidence in the first case were used in the 13 other cases. Judge NIXON held that the fee of two dollars and fifty cents was taxable for each deposition in each one of the 14 cases.

The contention of the plaintiff here is, that the fee for a deposition cannot be taxed in any other suit than that in which it was taken; that it is not enough that the deposition is "admitted in evidence in a case," but it must be taken in the same cause; that the object of the stipulations and orders was to save the labor and expense of taking the depositions more than once; and that, therefore, they cannot be charged for as actually taken when they were not actually taken.

The question has been before this court. In *Simon v. Neumann*, the depositions of 38 witnesses, taken in another suit in this court, heard at a different time, were admitted in evidence, by virtue of a stipulation that "all the evidence taken for the final hearing," on both sides, in the other suit, "may be read on the final hearing herein, with the same force and effect as if taken herein." On taxation, the clerk disallowed the charge of \$2.50 for each of the 38 depositions, and Judge WALLACE, in July, 1884, after hearing counsel for both parties, affirmed the taxation. No distinction favorable to the allowance of the fee can be taken between the case of *Simon v. Neumann* and the present cases, and it is proper that the ruling in that case should be followed as the law of this circuit, as the taxations in the

present cases, in October, 1884, were, as to this point, based on the ruling of this court in *Simon v. Neumann*.

3. *Copies of papers.* The following items in suit No. 1, for copies of papers, were disallowed:

1. Copy deposition in <i>Magic Ruffler Case</i> ,	-	-	-	\$ 1 25
2. Copy deposition Wooster, (from Gutman,)	-	-	-	5 70
3. Copy testimony Asa Wilmot,	-	-	-	14 60
4. Certificate of loss of deposition and copy deposition, (Gutman,)	-	-	-	3 60
5. Copy opinion,	-	-	-	3 00
6. Stenographer's minutes of argument and copy,	-	-	-	103 50
7. Copy testimony in interference, <i>Robjohn v. Pipo</i> ,	-	-	-	47 50

The following items in suit No. 2, for copies of papers, were disallowed:

8. Copy <i>prima facie</i> proofs, (Gutman,)	-	-	-	\$10 20
9. Copy of Carey's deposition, (Gutman,)	-	-	-	7 50
10. Copy of Kellogg's deposition,	-	-	-	5 75
11. Copy of Pipo's deposition,	-	-	-	5 00
12. Copy of part of testimony taken,	-	-	-	30 00

The following items in suit No. 9, for copies of papers, were disallowed:

13. Copy deposition Wooster, from Gutman,	-	-	-	\$ 5 34
14. Copy of part of evidence before master,	-	-	-	4 80

Item 1 was obtained to be used in opposing a motion for a preliminary injunction. Items 2, 8, 9, 10, 11, 12, 13, and 14 were for copies of testimony taken on behalf of the plaintiff, either in chief or before the master, the copies being procured by the defendant so as to be informed of the contents and to be prepared to meet the evidence. Item 3 was for a copy of a deposition of a person, obtained for use on a motion made in suit No. 1, by the defendant, to open the proofs therein and allow the deposition of that person to be taken as a witness in suit No. 1, the object of procuring the copy being to show the relevancy of the evidence. Item 4 was a certificate from the examiner as to the loss of the deposition of a witness taken in suit No. 1, and a copy of a second deposition of the same witness taken in suit No. 1, the certificate and copy being obtained for use on a motion in reference to the lost deposition. Item 5 was for a copy of the opinion of the court given on the decision in favor of the plaintiff on the first hearing in suit No. 1, the copy being obtained for use by the defendant in settling the decree on that decision. Item 6: At the first hearing in suit No. 1, the defendant had no brief prepared, and the hearing proceeded, with leave to the defendant to send in afterwards a printed argument. To enable him to do this, he employed a stenographer to take down the oral argument for the defendant. Item 7 was for a copy from the files of the patent-office of the testimony in an interference case. Accompanying the motion for a rehearing in suit No. 1, there was a motion by

the defendant for leave to put in evidence the interference testimony, and such copy was part of the moving papers on that motion. The motion was not granted.

The provision of section 983 is, that "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials, in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed" and "be included in" the "judgment or decree against the losing party." The papers must be not only for use "on trials," or, as the act of 1853 says, "on trial,"—that is, such trials and final hearings as are elsewhere spoken of, (for this provision came from the act of 1853, and must be interpreted in the light of the other provisions of that act,)—but the language implies that the copies must have been actually used on or in the trial or final hearing, (or, at least, obtained for such use under a rule or an order or a stipulation,) and the fact of such use, or the existence of such rule or order or stipulation, is evidence that the copy was "necessarily obtained for use." As section 983 relates to exemplifications and copies of papers, it covers that subject, and excludes all of that class which are not there provided for. It excludes papers used on interlocutory or preliminary or incidental motions or hearings. Copies of papers in the suit, obtained from the clerk, and otherwise properly taxable, are included in the provision, in section 983, for taxing "the bill of fees of the clerk." In these cases, the plaintiff did not object to certified copies from the clerk, of orders in the suits, required by the rules to be served.

In *Hathaway v. Roach*, 2 Woodb. & M. 63, 74, in 1846, in the circuit court for the district of Massachusetts, even before the act of 1853, Mr. Justice WOODBURY disallowed a charge by the defendant for a copy of the plaintiff's patent, on the ground that it was not needed in order to be used as evidence by the defendant, but was wanted for preparation and argument.

In *Hussey v. Bradley*, 5 Blatchf. C. C. 210, in 1864, in the circuit court for the Northern district of New York, the expense of reporting for the court the argument on the final hearing was disallowed by Judge HALL (Mr. Justice NELSON concurring) because there was no agreement of the parties that the expense should be taxed.

Under the foregoing views, all of the above 14 items were properly disallowed.

4. *Traveling expenses of messengers and attorneys, and expense of box.* The following item in suit No. 1 was disallowed:

15. Expenses of messenger from patent-office with original models, - \$25 00

The following items in suit No. 2 were disallowed:

16. Expenses B. F. Lee, Syracuse, - - - - -	\$37 86
17. Expenses B. F. Lee, Wilkesbarre, - - - - -	20 50
18. Expenses B. F. Lee, at Boston, - - - - -	70 83
19. Box for preserving exhibits in clerk's office, - - - - -	5 80
20. Expenses W. H. L. Lee, at Navesink, - - - - -	2 00
21. Paid messenger from clerk's office, with exhibits, - - - - -	13 00

Item 15 was for the expense of a messenger in bringing from the patent-office, for use in opposition to a motion for a preliminary injunction in suits Nos. 1, 9, and 10, certain original filed models, with a view of showing that the original patents were invalid. Items 16, 17, 18, and 20 were for traveling expenses of the solicitor in attending to take testimony. Item 19 was for the cost of a box to preserve the exhibits in the clerk's office. Item 21 was for bringing from the clerk's office to the office of counsel, for use in taking testimony in suit No. 2, the exhibits and filed papers in suits Nos. 1, 9, and 10.

In *Hussey v. Bradley*, 5 Blatchf. C. C. 210, in 1864, in the circuit court for the Northern district of New York, Judge HALL (Mr. Justice NELSON concurring) disallowed the traveling expenses of counsel in attending court; and the expense of models and old machines used in evidence as exhibits, (which did not appear to be copies of models in the patent-office;) and the expenses of their transportation, and of taking charge of the same.

Item 15, being for use on a motion, cannot be classed as amounting to the use, as evidence in chief, of a copy of a model in the patent-office.

It is sought to maintain the propriety of allowing items 16, 17, 18, 19, 20, and 21, on the view that they were actual disbursements necessarily incurred in the exercise of the right of examining witnesses; and the cases of *Hussey v. Bradley*, 5 Blatchf. C. C. 212; *Dennis v. Eddy*, 12 Blatchf. C. C. 195; and *Gunther v. Liverpool, etc., Ins. Co.* 20 Blatchf. 390, S. C. 10 FED. REP. 820, are cited. In the first case, money paid for telegraphic dispatches, properly and necessarily expended in the progress of the suit, was allowed, on the same principle on which necessary and proper postages were allowed. In the second case, the cost of printing papers which a rule of court required to be printed was allowed, as a necessary disbursement, made by order of the court; and it was held that the act of 1853 did not prohibit the allowance of indemnity for such disbursements as were made necessary by an order of the court. In the third case, it was held that a disbursement of one dollar, paid for serving the summons by which a suit at law was commenced, was taxable as a necessary disbursement actually made, and taxable by virtue of the rules of the court, it having been so taxable prior to the act of 1853; and that section 983, relating to copies of papers, did not forbid the taxation of disbursements other than fees for such copies of papers. In this connection it may be noted, that section 5 of the act of 1853 provided as follows: "All laws and regulations heretofore made, which are incompatible with the provisions of this act, are hereby repealed and abrogated." But rules and regulations not so incompatible remained in force.

Items 16, 17, 18, 19, 20, and 21 were never taxable before or since the act of 1853.

5. *Machine exhibits.* The following items in suit No. 1 were disallowed:

22. Exhibit Carey Machine, - - - - -	\$ 23 20
23. Exhibit Wilmot First Ruffler; Exhibit No. 13, (Barney;) Exhibit Crosby & Kellogg Spring Blade Machine, - - - - -	170 00
24. Rufflers Exhibit, (hinged, etc.,) - - - - -	10 00

The following items in suit No. 2 were disallowed:

25. Ruffler Exhibits, - - - - -	\$ 5 00
26. Fanning machine, - - - - -	66 25

These machine exhibits represented structures regarding which proof was given that they anticipated the plaintiff's patent, and the models enabled the oral evidence to be understood. But they were none of them models from the patent-office of the patented invention in suit. Items for exhibits of that character were taxed. Nor were any of the items disallowed procured under order or rule of court, nor was there any stipulation that they should be taxed. Such machine exhibits were not taxable before the act of 1853. *Hathaway v. Roach*, 2 Wood. & M. 63.

The cases of *Parker v. Bigler*, 1 Fisher, 285, in 1857, and *Woodruff v. Barney*, 2 Fisher, 244, in 1862, are to the effect that the items here in question cannot be allowed.

In *Hussey v. Bradley*, 5 Blatchf. C. C. 110, in 1864, in the circuit court for the Northern district of New York, Judge HALL held (Mr. Justice NELSON concurring) that the expense of copies of models in the patent-office, properly procured for use as a part of the evidence in the suit, might be allowed for, but that the expense of other models and machines was not allowable.

6. *Photolithographing exhibits.* The following item in suit No. 2 was disallowed:

27. Photolithographing exhibits, - - - - -	\$17 75
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These were not drawings from the patent-office, but were sketches introduced by witnesses in giving their evidence. They fall under the rule as to machine exhibits, as they were substantially of that character.

7. *Witness fees not paid.* The following items for witness fees were disallowed:

In suit No. 2, 3 witnesses, 1 day each, - - - - -	\$ 4 50
" No. 3, 7 " 1 " - - - - -	10 50
" No. 4, 6 " 1 " - - - - -	9 00
" No. 5, 7 " 1 " - - - - -	10 50
" No. 6, 7 " 1 " - - - - -	10 50

These witnesses had not been paid their fees in these several cases, but had been paid their fees as witnesses in one or more of others of these cases.

The statute (section 983) allows the amount "paid" to witnesses to be taxed. In *Cummings v. Akron Cement, etc., Co.* 6 Blatchf. C. C. 509, and *Dennis v. Eddy*, 12 Blatchf. C. C. 195, as is clearly to be inferred, the witnesses had been paid, and the question was whether their

fees were taxable, inasmuch as it was not shown that they had attended on service of a subpoena.

If a party does not pay a witness either before or after he has testified, the presumption is that the debt is forgiven, unless the failure to pay is explained in such wise that the fee can be considered as if "paid," because both parties intend it shall be paid. Nothing of that kind here appears. Witnesses are generally paid in advance, or at the time, or soon afterwards, and where, as here, they are paid in one or more cases, and not in others, the evidence is strong that they are never to be paid, especially where the lapse of time is so great, as here, between the rendering of the service and the taxation.

The objections taken by the plaintiff to the allowance of items which were allowed will next be considered.

8. *Depositions of witnesses sworn in more cases than one.* In suits Nos. 1, 9, and 10 there was but one record of proofs, and each witness on both sides was sworn in each of the three suits; and his deposition was written down only once, and was entitled in the three suits. The same is true as to suits Nos. 2, 3, 5, and 6, except that a few depositions taken in other cases were admitted by stipulation. The record in suit No. 4 was the same as that in suits Nos. 2, 3, 5, and 6, a part of it being admitted by stipulation from other cases, and, as to the rest, each witness being sworn in this case, and in each one of suits Nos. 2, 3, 5, and 6, and his deposition written down only once, and entitled in the five cases. In the bills of costs as taxed, the clerk allowed a deposition fee to the solicitor of two dollars and a half for each witness in each case in which his deposition was entitled, although in suits Nos. 1, 9, and 10, as a group of titles, the testimony of the witness was written down but once, on one direct and one cross-examination for all three cases, and in suits Nos. 2, 3, 4, 5, and 6, as a group of titles, the testimony of the witness was written down but once, on one direct and one cross-examination, for all five cases. The plaintiff contends that there should be but one deposition fee of two dollars and a half for each witness, for each writing down of his testimony. His objection covers the following number of depositions taxed: Suit No. 1, 18; suit No. 3, 42; suit No. 4, 14; suit No. 5, 39; suit No. 6, 40; and suit No. 9, 19; in all, 172, at \$2.50 each, \$430.

The language of section 824 is, "for each deposition taken and admitted in evidence in a cause, two dollars and fifty cents." The act of 1853 said, "in the cause." Each of the depositions allowed for was taken and admitted in evidence in each suit in which it was entitled. It was for the parties to agree that the fee should be taxed but once for the group of cases, if that was to be the rule. Otherwise, the fee was taxable, because the deposition was taken in each case, and admitted in evidence in each case, although the writing was not repeated for each case. Where several cases are heard at the same time, on one argument, a docket fee is always taxed in each case.

9. *Fees paid the same witness in more than one case.* In the cases

mentioned in clause 8, above, where the witness was sworn in several cases at once, but his deposition was taken in all of them at the same time, by being written down once, as given, under the titles of all of the several cases, the defendants paid the witness his lawful witness fees in each one of the several cases in which his deposition was entitled, to the same extent they would have done if his deposition had been written down separately for each of the cases. The clerk taxed the fees so paid. The plaintiff objects to the taxation. The amounts objected to are, in the several suits, as follows: No. 3, \$75; No. 4, \$18; No. 5, \$73.50; No. 6, \$75; No. 9, \$42; No. 10, \$42.

By section 848, a witness is allowed one dollar and fifty cents for each day's attendance in court, or before an officer pursuant to law. This necessarily means that he is entitled to that in each suit in which he attends. The same section makes special provision for the case where a witness is subpoenaed "in more than one cause between the same parties, at the same court;" thus leaving the case where he attends in more than one cause between different parties, or where only one of the parties is the same, to be regulated by the general provision, in the absence of any rule of court, or special order, or stipulation of parties. This view was held in *Parker v. Bigler*, 1 Fisher, 285, in 1857, in the circuit court for the Western district of Pennsylvania, by Mr. Justice GRIER.

10. *Certified copies of papers put in evidence.* The clerk allowed, on taxation, the disbursements paid for various copies of papers put in evidence by the defendants, and forming part of the record for final hearing. They comprised documentary exhibits not from the patent-office; documentary exhibits from the patent-office, (other than patents,) but which were not part of the file wrapper and contents of the patent sued on, and not assignments affecting the plaintiff's title to that patent; and certified copies of patents other than the one sued on, which did not affect the plaintiff's title to that patent, and were not mentioned in the bill of complaint. One of the above items was for drawings from the patent-office, to bind with the printed record, being drawings of patents and drawings in file wrappers. They pertained to the text in the record, and fairly come under the head of the printing required by the rule. All of the above items were taxable. They were, under section 983, "copies of papers necessarily obtained for use," being put in evidence, and there being no order rejecting them as evidence.

11. *Incompetent and immaterial testimony.* Under the provision in rule 67 in equity, that "the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just," the plaintiff, now, for the first time, on an appeal from the taxation of costs, applies to the court to declare certain depositions to be incompetent and immaterial. This is done on an affidavit made by the counsel for the plaintiff, more than a month after the costs were taxed, setting forth that, in his opinion, certain

depositions, evidence, and exhibits introduced by the defendants are incompetent or immaterial, and the cost of introducing and printing them should not be charged against the plaintiff. He specifies 18 different items. The counsel for the defendants makes an affidavit expressing a contrary opinion. Under this state of facts, it is a sufficient ground for denying the application, that the plaintiff did not, at or before the final hearing in June, 1884, or before the taxation of costs, move to strike out the evidence in question. Whatever objections may have been taken to any of the testimony at the time it was introduced, (and only such objections could be considered, in any event,) they were waived by the laches. It results that the taxations are all of them affirmed, except that, in each of the suits Nos. 1, 9, and 10 a docket fee of \$20 is to be added.

FOSTER, who sues, etc., v. SEYMOUR and Others.

(Circuit Court, S. P. New York. February 6, 1885.)

CORPORATION—ISSUE AND EXCHANGE OF STOCK FOR OTHER PROPERTY BY TRUSTEES—FRAUD—ACCOUNT.

Where the statute under which a company is incorporated authorizes the trustees to issue stock and exchange it for property, and declares that when exchanged such stock shall be taken to be full-paid stock and not liable to further calls; and the trustees, being the only members of the corporation, exchange the whole capital stock in payment for the purchase of mining property owned by themselves, and, after division and distribution of the stock among themselves, sell it as full-paid stock to innocent purchasers,—such purchasers cannot maintain a suit to compel the trustees to account to the corporation for a fraudulent disposition of its capital stock.

In Equity.

W. F. Scott, for plaintiff.

H. M. Ruggles and T. W. Osborn, for defendants.

WALLACE, J. The bill of complaint is filed by the complainant as the holder of certain shares of stock in the Central Arizona Mining Company against that corporation and its trustees personally to require the trustees to account to the corporation for a fraudulent disposition of its capital stock. The bill alleges, in substance, that the whole capital stock of the corporation, which was fixed and limited by the certificate of incorporation of the company at 100,000 shares of \$100 each, was exchanged by the trustees of the corporation in payment for the purchase of mining property owned by the trustees personally, or some of them, the value of which did not exceed \$100,000, as the trustees knew. The bill further alleges that the trustees, after such exchange of the capital stock, divided and distributed it among themselves, and sold it as full-paid stock to innocent purchasers including the complainant; and the trustees realized large sums

of money thereby which they applied to their own use. The bill also contains allegations for the purpose of showing that the trustees exert entire control over the corporation, and that the corporation refuses to bring an action against them for relief in the premises. It is not alleged in the bill that when the stock of the corporation was exchanged for the mining property any part of the capital stock had been subscribed for, or that any part of it had ever been paid into the company, or that it represented any corporate property; but the bill alleges that the trustees issued it, and delivered it as full-paid stock to themselves in exchange for the mining property.

The statute under which the company was incorporated authorizes the trustees to issue stock and exchange it for property, and declares that when exchanged such stock shall be taken to be full-paid stock, and not liable to further calls. Laws N. Y. 1853, c. 333, § 2. The statute, however, permits the trustees to exchange stock to the amount only of the value of the property for which it is exchanged. Upon these facts the corporation has no right of action against the trustees.

The corporation lost nothing by the transaction disclosed by the bill, except the paper which was created and called capital stock. None of its capital was diverted. The scrip was not capital stock. The capital stock of a corporation is the money or property which is put into a corporate fund by those who subscribe for stock, and thereby agree to become members of the corporate body. Unless it represents capital contributed, or agreed to be paid in, it has no value. *Burrall v. Bushwick R. Co.* 75 N. Y. 216; *Sturges v. Stetson*, 1 Biss. 246. The property it received in exchange for the scrip had some value; certainly as much as the scrip had. There was no fraud upon the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there was of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of \$100 each. *The Ambrose Lake Tin & Copper Min. Co. (Ex parte Taylor)*, L. R. 14 Ch. Div. 390; *Re Seamless Box Co.* L. R. 17 Ch. Div. 46.

The transaction as alleged was a fraud upon the public. It was equivalent to an overissue of stock by a corporation to its stockholders. It was calculated to lead parties, dealing with the corporation in ignorance of the facts, to believe that it had a paid-up capital stock of \$10,000,000, and representing a corporate fund of that amount invested in mining property. By putting out the scrip, the trustees represented to the public, who have no means of knowing of the private contracts made between a corporation and its stockholders, that the capital stock had been subscribed for and paid in. It was not a fraud upon stockholders, however, because there were none; nor necessarily upon persons subsequently becoming stockholders, because the stock was full-paid stock, and not liable to any further calls in

the hands of those who might purchase it. *Scovill v. Thayer*, 105 U. S. 143. A purchaser of the stock would not be injured by the transaction unless he paid more for it than it was worth; and every purchaser would stand upon the particular circumstances of his purchase. If the original transaction, in connection with the special facts of a purchase of stock, should operate as a fraud upon a purchaser, the cause of action would be his, and not that of the corporation. The fraudulent character of the transaction was imparted to it by the corporation itself; that is, by those who represented all there was of the corporation. The remedy of the complainant, if he has been deceived into the purchase of stock by false representations as to its value, is against those who have misled him. Even if he could recover against the corporation or against the trustees, (see *Fosdick v. Sturges*, 1 Biss. 255,) the corporation has no cause of action against the trustees.

Upon the argument of the demurrer, the opinion was expressed that the bill was defective in not alleging the necessary efforts of the complainant to set the corporation in motion to seek such redress as it ought to seek, within the rule declared in *Hawes v. Oakland*, 104 U. S. 460, and subsequent cases in the supreme court. It has been deemed proper, however, to meet the main question in the case in disposing of the demurrer.

The demurrer is sustained.

GREEN v. COOS BAY WAGON ROAD CO.

(Circuit Court, D. Oregon. March 2, 1885.)

1. STATUTE OF LIMITATIONS.

An agreement or promise made without a consideration to postpone or extend the time of payment of a debt or demand is void, and does not, therefore, prevent the running of the statute against the right of the creditor to maintain an action thereon.

2. SAME—ACKNOWLEDGMENT.

From an acknowledgment of the existence of a debt under circumstances that indicate a willingness or liability to pay the same, the law will imply a promise to pay, upon which an action may be maintained during the statutory period of limitation thereafter.

3. NEW PROMISE—HOW PLEADED.

In pleading a new promise, or an acknowledgment or agreement from which such promise will be implied, it need not be alleged that the same was made in writing, but that fact will be presumed until the contrary is shown.

Action to Recover Money.

Thomas N. Strong, for plaintiff.

James F. Watson and Edward B. Watson, for defendant.

DEADY, J. This action is brought by A. T. Green, of California, against the defendant, a corporation duly formed under the laws of

Oregon, to recover the sum of \$3,000, with interest from June 1, 1875, amounting to \$2,825. The action was commenced on November 10, 1884; and it is alleged in the complaint that on April 17, 1875, the defendant was the owner of 96,325 acres of land in Douglas and Coos counties, in this state, for 35,533 acres of which it had a patent from the United States, and was entitled to a patent for the remainder; that the defendant then agreed with the plaintiff that if he would find a purchaser for said lands, it would pay him a commission of \$5,000; that the plaintiff accepted said proposition, and afterwards, on May 31, 1875, the plaintiff found a person who purchased said lands of the defendant at one dollar per acre, and paid for the patented portion thereof at once, and agreed to pay for the remainder as soon as the patent was issued therefor; that on July 26, 1875, the defendant paid the plaintiff on account the sum of \$2,000, and requested him "to wait for the payment" of the remaining \$3,000 until it received the balance of the purchase price, to which he agreed; that the plaintiff at the same time agreed to, and afterwards did, assist the defendant to get the remainder of said purchase price, which was paid to it on January 7, 1884; and that on January 12th, the plaintiff duly demanded of the defendant payment of said \$3,000, with legal interest thereon from June 1, 1875, which it refused. The defendant demurs, for that "it appears on the face of the complaint that said action was not commenced within the time prescribed by law," and "is barred by the statute of limitations."

The Code of Civil Procedure, § 66, provides that the defense of the statute of limitations may be made by demurrer when it appears on the face of the complaint that the action has not been commenced within the period prescribed by law. The contention of the defendant is that it appears from the complaint that whatever was to be paid to the plaintiff for his services in procuring a purchaser of the property was due and payable on May 31, 1875, when the service was performed, or, at the furthest, on July 26th, when the purchaser paid the first installment of the purchase money, and the plaintiff received the two-fifths of the commission claimed by him, and that at the expiration of the six years thereafter, to-wit, July 26, 1881, the claim for the balance of \$3,000 was barred by the lapse of time. The plaintiff's answer to this proposition is that by the agreement of July 26th, the payment of his claim was postponed until the defendant should receive the remainder of the purchase money, which did not occur until January 7, 1884, at which time the statute commenced to run against the claim, and not before; citing *Webber v. Williams College*, 23 Pick. 302; Ang. Lim. p. 111, § 120; *Lichty v. Hugus*, 55 Pa. St. 434; *Irving v. Veitch*, 3 Mees. & W. 90. According to the complaint this \$3,000 was due the plaintiff at the date of this agreement, and had been since June 1st, from which time he seeks to recover interest on that sum. Without doubt, if the arrangement made between the parties on July 26, 1875, constituted a valid agreement, the day of payment

was postponed until January 7, 1884, and the statute did not commence to run until that time.

But it does not appear that there was any consideration for the plaintiff's promise to delay action in the premises. The defendant neither gave nor forebore anything in consideration of or on account of the plaintiff's promise; while, on the other hand, the plaintiff undertook the further service of helping to obtain the remainder of the purchase money without, as appears, any compensation therefor. The promise was then a mere *nudum pactum*, which did not in law prevent the plaintiff from maintaining an action in the mean time to recover whatever was due him from the defendant. And from the time the plaintiff's right to sue commenced, the statute commenced to run against it, and cut it off by June 1, 1881. As was substantially said in *Chace v. Chapin*, 130 Mass. 128, of a similar agreement between the maker and payee of a note to postpone the day of payment thereof, there is no advantage to the defendant nor disadvantage to the plaintiff growing out of the agreement which can constitute a consideration for the plaintiff's promise to postpone the payment of the sum then due him, and therefore it is not binding on him. Notwithstanding the promise, he could, at any time within six years from June 1, 1875, have maintained an action against the defendant to recover the unpaid commission. See, also, *Shapley v. Abbott*, 42 N. Y. 447.

The cases cited by counsel for the plaintiff do not support his contention in this respect. In *Irving v. Veitch*, *supra*, the agreement to postpone the payment of the defendant's notes was made on a valuable consideration. Besides, there were payments made on them within six years before the action was commenced, which circumstance of itself was sufficient evidence of an acknowledgment whereon to raise an implied promise to pay the notes. In *Lichty v. Hugus*, *supra*, it was decided that the statute will not run against the claim of an attorney for compensation for services until the undertaking in which he is engaged is performed, or the relation of attorney and client is terminated. To the same effect is the citation from *Angel*, *supra*. But the relation of attorney and client never existed between these parties. And however analogous the relation between them may have been to that of attorney and client, it came to an end on June 1, 1875, and the only relation that existed between them thereafter was that of debtor and creditor. The plaintiff was not employed for a continuous and indefinite service, but to do a specific thing,—a job; to find a purchaser for the defendant's land at an agreed compensation. This he did on May 31, 1875, and was then entitled to his commission. Afterwards, the plaintiff, on receiving two-fifths of what was due him, agreed to wait for the payment of the remainder until the happening of a certain event.

The case of *Webber v. Williams College*, *supra*, is not in point. The plaintiff held the note of the defendant which would become due

within the year. The defendant wrote to the plaintiff asking a year's delay, and saying that the right of the latter to sue should not be prejudiced by the delay. The creditor answered, denying the request, but did in fact delay bringing an action on the note for a year, and until the statute had run. The defendant pleaded the statute, and the court held with the plaintiff. The matter is very summarily and somewhat obscurely disposed of, the court saying that the defendant's offer was "a good waiver of the statute of limitations." The expression "waiver of the statute" is misleading, and not applicable to the case. A party may be said to *waive* the statute by not pleading it when he might, but not otherwise; and the better opinion seems to be that the bar of the statute cannot be waived or renounced in advance, as that would put it in the power of individuals to dispense with the law, contrary to the public policy and peace it is intended to promote and preserve. Ang. Lim. § 247, note. But, whatever may be said of the grounds of the decision, there is no doubt of its correctness. It was a clear case of an acknowledgment of the existence of the debt by the debtor, under circumstances that indicated a willingness to pay the same, from which the law implied a promise to pay that might be enforced by an action within the statutory period thereafter. And so the case is characterized in *Shapley v. Abbott*, *supra*, 447, and in Ang. Lim. § 247, note. And so the agreement in this case, so far as the defendant is concerned, may be the equivalent of an acknowledgment of the debt. But it does not appear from the complaint to have been reduced to writing and signed by the defendant.

The Code of Civil Procedure, § 24, provides that "no acknowledgment or promise is sufficient evidence of a new or continuing contract," to take a case out of the operation of the statute of limitations, "unless the same is contained in some writing, signed by the party to be charged thereby." But I presume the rule in pleading a contract within the statute of frauds applies in this case. It is sufficient to allege the matter according to its tenor or legal effect, without stating that it was in writing, and if the adverse party wishes to take advantage of the statute he must aver that it was not in writing as a matter of defense or reply, as the case may be. *Lamb v. Starr*, Deady, 353.

Assuming, then, that the agreement of July 26th was in writing, it was in effect a valid acknowledgment of an existing debt that the defendant was willing to pay. And from this the law would imply a promise by the defendant to pay, grounded on the consideration of the antecedent liability, from which point of time the statute of limitations commenced to run against the claim anew. *Bell v. Morrison*, 1 Pet. 351; Ang. Lim. c. 22. The acknowledgment, however, does not take the case out of the operation of the statute prospectively, but only as to the past. It commences to run again simultaneous with the new promise, and in six years thereafter bars the remedy thereon.

Now, the acknowledgment in this case being made on July 26, 1875, the statute had run against the action of the new promise on the same day in 1881. It is admitted that this action is barred by lapse of time unless the transaction of July 26th has the effect to save it. But, as we have seen, it is void as an agreement to postpone the day of payment for want of a consideration; and, though good as an acknowledgment from which the law would imply a new promise to pay, an action thereon has since been barred by lapse of time.

The demurrer must be sustained; and it is so ordered.

CONROY v. OREGON CONSTRUCTION Co.

(Circuit Court, D. Oregon. March 6, 1885.)

1. CONTRIBUTORY NEGLIGENCE.

What is known as "contributory negligence" is a defense; and therefore, in an action by a servant against his master, to recover damages for an injury to the person, sustained while in the employment of the latter, the plaintiff need not allege that his own negligence did not contribute to the result.

2. "ON OR ABOUT" A CERTAIN DAY.

In an action for an injury to the person, arising from the negligence of the defendant, it was alleged in the complaint that the injury occurred "on or about" a certain day. *Held*, that this was not a statement of any distinct day or time, and therefore it did not appear from the complaint that the action was barred by lapse of time; and such defense, if made at all, must be made by answer.

3. TIME IN PLEADING.

When time is not an essential element of the cause of action, under the Code, a demurrer will not lie to a complaint for want of a date to a material fact alleged therein, but the remedy for such omission is a motion to make more definite and certain in this respect; and if it appears on the face of such amended complaint that the action is barred by lapse of time, the defense may be made by demurrer.

Action for Damages for Injury to the Person.

C. E. S. Wood, for plaintiff.

George H. Williams and George H. Durham, for defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of California, against the defendant, a corporation formed under the laws of Oregon, to recover \$50,000 damages, for injuries to his person sustained while in the employ of the defendant. The action was commenced on November 12, 1884. The complaint alleges that "on or about" November 13, 1882, the plaintiff, while in the employ of the defendant as foreman of a gang of Chinese laborers, engaged in the construction of the railway known as the "Oregon Short Line," near Meacham's station, in this state, was ordered by George Gray, a person in the immediate charge of the business for the defendant, "to fire certain blasts;" that in so doing he "exercised all possible skill and precaution," but, nevertheless, the said blast exploded pre-

maturely, and caused great injury to the plaintiff, including the loss of his sight; and that the cause of said explosion "was the defective and faulty fuse supplied to the plaintiff by the defendant," of which the latter had notice. The defendant demurs, for that (1) it appears the action is barred by lapse of time; and (2) the complaint does not state facts sufficient to constitute a cause of action.

On the argument, the only point made in support of the second cause of demurrer was that it did not appear from the complaint that the plaintiff was aware of the defect in the fuse; and therefore it does not appear but that his own negligence contributed to his injury. But the allegation in the complaint, that the plaintiff used "all possible skill and precaution" in firing the blast in question, is equivalent to an allegation that he was not guilty of any negligence in the premises. And if knowledge of the faulty condition of the fuse would, under the circumstances, make his conduct negligent, an averment that he acted prudently, or not negligently, is equivalent to a denial of such knowledge. But I do not think it necessary for the complaint to contain any allegation on the subject. The law does not presume that any one is negligent; especially when such negligence may or will result in his own personal injury. True, if it appears on the trial, whether from the evidence of the plaintiff or defendant, or both, that the former was guilty of "contributory negligence," as it is called, he cannot recover. But he is neither bound to allege nor prove that he was not guilty of such negligence, in order to make out a case against the defendant. It is matter of defense; and if the defendant would avail himself of it, he must allege and prove it.

So much upon principle; but on authority the rule is unsettled in the state courts. In *Thomp. Neg.* 1176, it is stated that 18 of the states of this Union are nearly evenly divided on the question whether "contributory negligence" is a part of the plaintiff's case or a matter of defense; while in New York and other states the decisions are irreconcilable. But the learned author, speaking for himself, says (1175) that such negligence is properly a matter of defense. Since the publication of this work the supreme court of this state appears to have decided that it is a part of the plaintiff's case; at least, there is a *dictum* to that effect in *Walsh v. Oregon Ry. & Nav. Co.* 10 Or. 253. But the decisions of the national courts, including the supreme one, are otherwise, and that is sufficient to control the action of this court.

In *Knaresborough v. Belcher S. Min. Co.* 3 Sawy. 446, it was held that a complaint which only alleged that the plaintiff sustained an injury from a defective platform negligently provided by the defendant was sufficient, and that knowledge of such defect on the part of the plaintiff, as evidencing contributory negligence, must be shown by the defendant. In *Holmes v. Oregon & C. Ry. Co.* 6 Sawy. 289, S. C. 5 FED. REP. 523, this court held that contributory negligence is a defense, the burden of proof to establish which is on the defendant; at the same time saying: "Any other rule than this violates all the anal-

ogies of the law, and is practically illogical and unjust." In *Railroad Co. v. Gladmon*, 15 Wall. 401, the supreme court decided that want of care on the part of the plaintiff, or what is termed "contributory negligence," is a defense.

The first ground of demurrer is based on subdivision 7 of section 66 of the Code of Civil Procedure, which permits a demurrer to the complaint when it appears therefrom that the action has not been commenced within the time limited by law. According to the complaint, the injury was sustained by the plaintiff, and the right of action therefor accrued, "on or about" November 13, 1882; and the action was commenced on November 12, 1884. The action was barred (Code Civil Proc. § 8) within two years from the time the right to sue accrued; and if the allegation that the injury was received "on or about" the 13th, is equivalent to an averment that it did occur on the 13th, the action was commenced in time. But an averment that a fact occurred "on or about" a certain day, is not an averment that it occurred on any distinct day or time. The actual day or time may be either before or after the one stated with an "on or about." In short, the averment amounts to nothing, so far as time is concerned. *U. S. v. Winslow*, 3 Sawy. 342. This being so, it does not appear on the face of the complaint when the right of action accrued, and therefore it cannot be said that the action was not commenced in time, and a demurrer for that cause will not lie.

At common law the rule was that every material fact in the declaration should be stated with a distinct averment of time and place. 1 Chit. Pl. 287, 288. And there is no reason why this rule should not be applied to the statement of a fact in a complaint under the Code of Civil Procedure. The latter (section 66, sub. 2) requires the facts constituting the cause of action to be concisely and intelligibly stated. But the time and place when and where each of such facts occurred, though proper and convenient to be alleged, as a matter of form, are not absolutely necessary to a sufficient statement of a cause of action, unless where time is a material element thereof, or the action is local.

The time when the plaintiff received this injury is not a matter of substance necessary to a sufficient statement of the cause of action, of which such injury or fact is a part, but rather an incident or qualification of the same. The statement of the fact of the injury, without the day it occurred, is so far a sufficient statement of a cause of action, and the complaint would support a verdict and judgment thereon. At common law, the omission to state the day in such a case could only be taken advantage of, as a matter of form, by a special demurrer; at least, after the statute of 27 Elizabeth. Gould, Pl. 468. And for this remedy the Code of Civil Proc. § 84, has substituted the motion to make more definite and certain. See *People v. Ryder*, 12 N. Y. 433, 439.

It follows that, if the defendant wants to make the defense of the

statute of limitations in this case, he must plead it in his answer; and this is the better way; or he may move to make the complaint more definite and certain in respect to the date when the injury occurred, and if it then appears that the action is barred by the lapse of time, he may make the defense by demurrer to the amended complaint.

UNITED STATES *v.* MATHEWS.¹

(Circuit Court, S. D. Ohio, W. D. February 26, 1885.)

1. EXCESSIVE COMPENSATION IN PENSION CASES—REPEAL OF ACT OF MARCH 3, 1881—EFFECT OF, ON PENDING PROSECUTIONS.

A pending prosecution for receiving excessive compensation for prosecuting pension claims in violation of the act of June 20, 1878, is not affected by the repeal of the clause of the general appropriation act of March 3, 1881, relating to act of June 20, 1878, by the act of July 4, 1884, although the repealing act contains no saving clause as to pending prosecutions. Section 13, Rev. St., operates to save prosecutions, generally, upon repeal of statutes upon which they are founded, unless the contrary is expressly provided in the repealing act. *U. S. v. Van Vleet*, 22 FED. REP. 641; *U. S. v. Hague*, 22 FED. REP. 706, not followed.

2. REPEALS—SAVING PENDING PROSECUTIONS—SECTION 13, REV. ST.

Section 13, Rev. St., which provides that "the repeal of any statute shall not have the effect to release or extinguish any *penalty, forfeiture, or liability* incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such *penalty, forfeiture, or liability*," held to cover a prosecution under a statute which authorizes imprisonment as well as fine. *U. S. v. Ulrick*, 3 Dill. 532, followed.

Motion in Arrest of Judgment.

Channing Richards, U. S. Atty., and *Henry Hooper*, Asst. U. S. Atty., for United States.

Alfred Yapple, for defendant.

SAGE, J. The defendant was indicted March 8, 1884, under section 5485, Rev. St., for receiving for his services in prosecuting a pension claim a greater compensation than the \$10 allowed by the act of July 20, 1878; the provisions of section 5485 having been, by a clause of the general appropriation act of March 3, 1881, made applicable to any person who should violate the provisions of said act of July 20, 1878. The defendant was tried and convicted before the repeal, July 4, 1884, of the clause of the act of March 3, 1881, above referred to. The repeal of the act of 1881 is without any saving clause as to offenses already committed, or prosecutions already begun. That upon the repeal of a penal statute without such saving clause, judgment will be arrested even after conviction, is so well settled as not to require verification. But section 13 of the Revised Statutes of the United States provides that "the repeal of any statute

¹Reported by Harper & Blakemore, Esqs., of the Cincinnati bar.

shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." This general provision, in the chapter of the Revised Statutes relating to the form of statutes and effect of repeals, made the insertion of a saving clause in the repealing enactment of July 4, 1884, unnecessary.

It is urged that, inasmuch as the punishment for violation of section 5485 is a fine or imprisonment at hard labor, or both, section 13 is not broad enough to cover this case; that here is neither "forfeiture" nor "liability," and that "penalty" cannot be properly construed to include imprisonment, even if it could be held to include a fine, which counsel for defendant denies. Penalty is the punishment inflicted by law for its violation. The term is mostly applied to a pecuniary punishment, (2 Bouv. Law Dict. 399,) but it is not exclusively so. The case of *U. S. v. Ulrici*, 3 Dill. 532, is in point upon all the propositions urged on behalf of the defendant. In that case Mr. Justice MILLER, sitting as circuit justice with TREAT, J., held that the thirteenth section of the Revised Statutes contains a general provision changing the rule of the common law invoked in favor of the defendant in this case; and he says that the section was intended to repeal the rule. It is only necessary, in passing upon the motion, to quote the language of Justice MILLER from page 534:

"Now, the counsel for the defendant argues that neither the word 'penalty,' 'forfeiture,' nor 'liability,' is equivalent to the word 'punishment;' and therefore that the section under which these indictments are drawn is repealed, unless the penal sanction is comprehended by the term 'penalty,' and this, he insists, means only that which can be enforced by a civil action; or by the term 'forfeiture,' which relates merely to property; or by the term 'liability,' which he says means merely subject to a civil proceeding. But, without attempting to go into a precise technical definition of each of these words, it is my opinion that they were used by congress to include all forms of punishment for crime; and as strong evidence of this view I found, during the progress of the argument, and called the attention of the counsel to, a section which prescribed fine and imprisonment for two years, wherein congress used the words 'shall be liable to a penalty of not less than one thousand dollars, * * * and to imprisonment not more than two years.' Moreover, any man using common language might say, and very properly, that congress had subjected a party to a liability; and, if asked what liability, might reply, a liability to be imprisoned. This is a very general use of language, and surely it would not be understood as denoting a civil proceeding. I think, therefore, that this word 'liability' is intended to cover every form of punishment to which a man subjects himself by violating the common laws of the country. Besides, as my brother TREAT reminds me, the word 'prosecution' is used in this section, and that usually denotes a criminal proceeding."

I am referred to the cases of *U. S. v. Van Vliet*, 22 FED. REP. 641: and *U. S. v. Hague*, 22 FED. REP. 706. In neither case does the re-

port show that section 13 was referred to or considered, and I think that I am bound to recognize *U. S. v. Ulrici* as the better authority. The motion is overruled.

See *U. S. v. Van Vliet*, ante, 35, reversing *U. S. v. Van Vliet*, 22 FED. REP. 641.

McKAY, Trustee, v. MACE and others.¹

(Circuit Court, E. D. Pennsylvania. October 20, 1884.)

LICENSE OF PATENT—CONSTRUCTION OF TERMS—IMPLIED MEANING—JURISDICTION OF CIRCUIT COURT—BILL FOR DISCOVERY AND ACCOUNT—CITIZENSHIP.

A license granted the use of a certain shoe-sewing machine, embodying a patent which was specified by its number, date, and the name of the patentee; "said machinery also embodying other patents which the said party of the first part now has, or may hereafter obtain, applicable to the said machine, or either of them." The license then gave the use of the above-mentioned patent, and also other patents granted to Lyman R. Blake, August 14, 1860, "for the term of the existence of the said patents, or any of them, and of all renewals or extensions of the same, * * * and also all patents which the said party of the first part now has, or may hereafter obtain, whether as original patentee or by assignment or license, applicable to said machine, and all extensions and renewals of the same." The license also provided "that this lease and license shall continue (provided the lessee comply with the terms thereof) until the expiration of all the letters patent which the lessees are hereby licensed to use, or any extensions or renewals of the same." The Blake patents of 1860 expired August 14, 1881, but the machine, at the execution of the license, embodied other patents not specifically designated in it, which did not expire until September 6, 1887. *Held*, that the license did not expire on August 14, 1881, the date of the expiration of the Blake patents of 1860, but continued in force until September 6, 1887, the date of the expiration of the term of the youngest patent embodied in the leased machine. A bill praying discovery and account for refusal to pay royalties under such a license is sustainable in the circuit court when the parties are citizens of different states.

In Equity. Bill for discovery, and an account brought by plaintiff, Gordon McKay, as owner and licensor of certain patents against the defendants Charles Mace and others, as licensees.

By the license, dated April 29, 1872, the plaintiff leased to the defendants—

"The McKay sewing-machine No. 1278 for uniting the soles of boots and shoes to their vamps or uppers, constructed according to the specifications, and embodying the invention contained and set forth in letters patent of the United States, granted to Lyman R. Blake on the sixth day of July, 1858, channeling machine No. 822, and bobbin winder No. 176; *said machinery also embodying other patents which the said party of the first part now has or may hereafter obtain, applicable to the said machine, or either of them.*

"And the said party of the first part doth also hereby license the said party of the second part to use the said patent above mentioned, granted to Lyman R. Blake on the sixth day of July, 1858, and also the patents granted to the said Lyman R. Blake on the fourteenth day of August, A. D. 1860, on the process of making a boot or shoe, and on the article so made *for the term of the existence of said patents, or any of them, and of all renewals and extensions of*

¹ Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

the same, said patents having been assigned by said Lyman R. Blake to said Gordon McKay, trustee; and also all patents which the said party of the first part now has or may hereafter obtain, whether as original patentee, or by assignment or license, applicable to said machine, and all extensions and renewals of the same."

It was further provided—

"That this lease and license shall continue (provided the lessees comply with the terms and conditions thereof) until the expiration of all the letters patent which the lessees are hereby licensed to use, or any extension or renewals of the same; and upon the expiration thereof, the lessees shall deliver to the lessor, his successors, legal representatives, or assigns, the machines hereby leased in good order, natural wear and tear alone excepted; and the said lessees shall thereupon, if they have kept all the conditions of this lease and license, have the right to purchase said machines for the sum of one dollar."

The licensees agreed to pay as rent for the machines, and for the license to use the patents, the sum of 10 cents for every pair of shoes made on the machines, or instead thereof, to purchase and apply to every pair of shoes thus made a license stamp, according to the schedule annexed to the license. They also covenanted to keep a daily account of all boots and shoes sewed on the machines, and to send a copy of the account to the licensor on the first of every month. The defendants accepted this license, and continuously from its date enjoyed the use of the licensed machines; but after August 14, 1881, they refused to render any account or to pay license fees. They claimed that as August 14, 1881, was the date of the expiration of the Blake patents of 1860, which were specifically designated in the license, it followed that the license expired on that date. On the other hand, it was contended by the plaintiff that the machinery embodied other patents, not designated by name in the license, but included under the general language of the licensing clause, the terms of which had not yet expired, and that the license remained in force until the expiration of the youngest of these. The patents not mentioned in the license, but claimed to be included under the licensing clause, were the McKay and Mathies patent of August 12, 1862, the McKay and Blake improvement of December 13, 1864, and the Blake patent of September 6, 1870. The name of each of these patents was conspicuously stamped on the machine used by the defendants. The defendants also set up the defense that in this case there could be no equitable jurisdiction.

Elias Merwin, (*Francis Rawle* and *Walter George Smith* with him,) for plaintiff.

Francis T. Chambers and *Furman Sheppard*, (*George Harding* with them,) for defendants.

Before McKENNAN and BUTLER, JJ.

McKENNAN, J. The right of the complainant to the relief which he prays depends upon the ascertainment of the date at which a license granted by him to the respondent expires. The construction of this license is not unattended with difficulty, growing out of the inaccuracy

of some of its phraseology, and the collocation of the phrase defining its duration, but with the assistance of an argument of uncommon vigor and clearness on both sides, we have reached a conclusion which, in our judgment, effectuates the intention of the parties, and a just solution of the controversy. The license is dated April 29, 1872. By its first clause the complainant "leased" to the respondents "the McKay sewing machine No. 1,278, * * * constructed according to the specifications, and embodying the invention contained and set forth in letters patent of the United States, granted to Lyman R. Blake on the sixth day of July, 1858, channeling machine No. 822 and bobbin winder No. 176; said machinery also embodying other patents which the said party of the first part now has or may hereafter obtain applicable to the said machine, or either of them." By the second clause "the said party of the first part doth also hereby license the said party of the second part to use the said patent, above mentioned, granted to Lyman R. Blake on the sixth day of July, 1858, and also the patents granted to the said Lyman R. Blake on the fourteenth day of August, A. D. 1860, on the process of making a boot or shoe, and on the article so made, for the term of the existence of said patents, or any of them, and of all renewals and extensions of the same, said patents having been assigned by said Lyman R. Blake to said Gordon McKay, trustee; and also all patents which the said party of the first part now has or may hereafter obtain, whether as original patentee, or by assignment or license, applicable to said machine, and all extensions and renewals of the same."

At the date of the license other patents than these individuated by specific designation were owned and controlled by the licensor, were actually embodied in the leased machine, and were essential to its profitable use. They were the McKay and Mathies patent of August 12, 1862, the McKay and Blake improvement patent of December 13, 1864, and the Blake patent of September 6, 1870, for 17 years, and expiring September 6, 1887. These patents were within the general description of the licensing clause, and are therefore comprehended by its terms, as fully as if they had been specifically identified. The Blake patents of 1860 were extended until August 14, 1881, when they finally expired. Since that date the respondents have continued the use of the leased machines and the above recited patents without the payment of the royalties agreed upon, or rendering any account of them, according to the requirements of the license, upon the hypothesis that it was then terminated by its own limitation. Considering the clauses of the license above quoted by themselves, this contention is not without at least plausible warrant. The right to use all the patents referred to is conferred by the license, without restriction, but the duration of such use is apparently referred to "the term of the existence" of the Blake patents, or any of them. The phrase which limits the term of the license is connected with the description of the Blake patents, and is expressly applicable to them, and it is not, therefore,

unreasonable to hold that the entire license is terminable by the expiration of these patents.

On the other hand, the consideration is not without great weight that the licensor could not have intended to concede to the licensees the uncompensated use of patents, which imparted to the leased machines their chief value, and had many years to run after the lapse of two years, when the Blake patents expired, or even after the possible extension of them for seven years, for the meager consideration of a moderate royalty, payable only during these periods. However this may be, the parties have, in a subsequent part of the license, declared their own understanding of its terms, and that is decisive of its meaning. In subdivision 3, under the eighth head in the license, it is agreed "that this lease and license shall continue (provided the lessees comply with the terms thereof) until the expiration of all the letters patent which the lessees are hereby licensed to use, or any extensions as renewals of the same." This language is unambiguous, and applies to all the patents, whether specifically or generally described, the right to use which is authorized by the license. In this category are several patents, as before stated, which were embodied in, or ingrafted upon, the leased machine. The youngest of them, the Blake patent of September 6, 1870, continues in force until September 6, 1887, and must therefore be taken as the measure of the duration of the license. Of the remaining ground of defense it is sufficient to say that it is unsustained. Nor is a more extended discussion of the pleas to the jurisdiction of the court required. The parties are citizens of different states; and the bill prays for a discovery and account. These are recognized heads of equity jurisdiction, and are cognizable in this court, although the groundwork of the relief sought is a contract touching the use of letters patent, because adequate relief cannot be obtained in a court of law.

There must therefore be a decree in favor of the complainants for discovery and an account, as prayed for; and counsel will accordingly prepare one.

UNION TUBING Co. and others v. PATTERSON Co. and others.

(Circuit Court, S. D. New York. February 9, 1885.)

1. PATENTS—REISSUE.

Reissued letters patent granted to Enoch Osgood, assignor, etc., July 30, 1872, for an improvement in process for rendering leather, etc., soft, flexible, and impervious to gas, are for the same invention described in the original, granted April 16, 1878, and valid.

2. SAME—INFRINGEMENT.

Such reissued patent is not infringed by the compound of glycerine, soap, borax, and sulphate of iron, as used by defendants in manufacturing their gas

tubing; the function of the glue in such compound being to make the tube gas-proof, of the glycerine to make it flexible, and of the other ingredients to cure the glue and glycerine so that they will not melt when subjected to heat.

In Equity.

Wetmore, Jenner & Thompson, for complainants.

Benjamin F. Thurston and Wilmarth H. Thurston, for defendant.

WALLACE, J. The reissued letters patent granted to Enoch Osgood, assignor, etc., July 30, 1872, for an improvement in processes for rendering leather, etc., soft, flexible, and impervious to gas, and which are alleged to be infringed by the defendants, are for the same invention described in the original, and the defense so far as it rests upon the invalidity of the reissue is not tenable. The specification of the original patent to Osgood, granted April 16, 1878, describes his invention as "a new and improved process of rendering leather, fibrous and porous materials, impervious to gas, preventing all gases from penetrating or escaping from such materials when made into bags, tubes, or other forms." The specification proceeds: "My invention relates to the use of glycerine for this purpose, and I carry out my invention as follows: The substances to be rendered impervious are first wrought into the desired form. When the articles are dry they are saturated with glycerine by immersion therein, or any process suitable therefor. This treatment renders them impervious to gas, preventing either its escape therefrom or penetration thereinto." The claim is: "The herein described process of rendering leather, fibrous and porous substances, impervious to gas, preventing the penetration into or the escape of gas therefrom by the application thereto of glycerine, substantially as set forth."

In the specification of the reissue, the invention is described to consist "in treating or saturating the leather, skin, cloth, or other article to be rendered pliable and gas-tight, with glycerine. The article to be prepared by my process is saturated by immersion in glycerine, with or without the aid of heat, or the glycerine may be rubbed in, or be applied by thorough brushing, or otherwise. The substances to be rendered soft and pliable, and impervious, may or may not be first wrought into the desired form before being treated with glycerine."

The claims of the reissue are as follows: (1) As a new article of manufacture, leather or skin, or their equivalent, saturated with glycerine, whereby said article is rendered impervious to gas, and soft and flexible, substantially as described. (2) The herein described process of rendering diaphragms, tubes, and vessels of leather, skin, or other fibrous and porous material, impervious to gas, soft and flexible, by saturating or treating the same with glycerine, substantially as set forth.

The real discovery of Osgood was a new treatment of leather, etc., with glycerine. He was not the inventor of glycerine. He could not patent any undiscovered property of glycerine or a result merely.

Glycerine was discovered by Scheele in 1779. Upon the proofs, it seems that glycerine had never been applied by saturation to leather, etc., until Osgood applied it. If his new application of the article produced a new and useful result he was entitled to a patent for his process, or for the new product of his process, or for both the process and the product. What that process was is very clear. It was a treatment of leather, etc., by saturation with glycerine. The degree of saturation, if there are any degrees, is not pointed out unless by describing the result. The saturation may be effected by immersion or by any other process that will saturate the material. When the material is impervious to gas the treatment is complete. Osgood saw fit in his original patent to claim the process only. After the lapse of four years his right to claim the product has been abandoned and lost by laches. If there was any mistake or inadvertence it was apparent on first inspection of the claim.

The second claim in the reissue is no broader than the claim of the original, and is for the same invention. In the original the claim properly construed, as has been shown, was one for the process of treating leather, etc., by saturation with glycerine until it becomes impervious to gas. Unless the material is sufficiently saturated either by immersion or in some other way to be impervious to gas, the process described and claimed is not employed. All reference to the results of the process in the specification and the claims is superfluous and meaningless, except so far as the statement of the results produced enter into the description of the process, and serve to point out what extent of saturation is a necessary part of the process. According to the new claim the material must be saturated sufficiently, not only to render it soft and pliable, but also impervious to gas. If there is any difference between this and the claim of the original patent it is one which tends to narrow the claim.

The defendants are manufacturers of gas tubing, and make that article under several patents which they control. In making their tubing they use a wire spiral or core, which they cover with cotton braid oiled with boiled linseed oil. After it has become dry, the tube thus formed is immersed in a vessel containing a compound of glue, glycerine, soap, borax, and sulphate of iron. In this compound the function of the glue is to make the tube gas-proof, of the glycerine to make it flexible, and of the other ingredients to cure the glue and glycerine so that they will not melt when subjected to heat. The compound thus composed is not an infringement of the complainant's patent. It is not saturated with glycerine to the degree required by the patented process. It is not sufficiently saturated to render it impervious to gas, but is composed of an ingredient impervious to gas, which is treated with glycerine in order to make it pliable. Certainly, the cotton braid is not saturated with the glycerine so as to be impervious to gas; the treatment first applied to it of saturating it in boiled oil is calculated to prevent it from becoming saturated by the com-

pound with which it is next treated. That no amount of saturation of such material with glycerine would render it gas-tight is clearly shown by the proofs.

The bill is dismissed.

COLGATE v. COMPAGNIE FRANCAISE DU TELEGRAPHE DE PARIS A NEW YORK.

(Circuit Court, S. D. New York. January 30, 1885.)

PATENTS—BILL OF DISCOVERY—ACTION AT LAW FOR INFRINGEMENT—CORPORATION DEFENDANT.

A bill in equity may be maintained in the United States circuit court against a corporation to compel a discovery in aid of an action at law brought against it to recover damages for the infringement of a patent.

In Equity.

Betts, Atterbury & Betts, for complainants.

Blatchford, Seward, Griswold & Dacosta, for defendant. *C. A. Seward and Chas. M. Dacosta*, of counsel.

WALLACE, J. The complainant has filed a bill of discovery in aid of a pending action at law in this court, wherein he is the plaintiff, brought against the defendant to recover damages for the infringement of letters patent for an invention. The subject of the patent is an improvement in electrical conductors for submarine telegraphic purposes. The bill avers that the defendant operates a cable telegraph under water, extending from the coast of France to some point on or near Cape Cod, Massachusetts, and also operates lines of telegraph wire, including a number of river and water crossings in the United States, and employs the plaintiff's invention in such lines of cable telegraph; that in the suit at law the defendant, in its answer, has pleaded non-infringement of said letters patent; that the complainant is unable to prosecute his action at law without a full discovery of the method of insulation of the said lines of cable telegraph, for the reason that such lines are under water and under the control of the defendant, and in localities unknown to the defendant, and are not open to his inspection; and that he cannot prove with accuracy and completeness the damages that he has suffered by reason of the infringement without the discovery by the defendant of the locality and length of said lines, the number of the conducting wires composing said lines, and without the inspection of certain contracts in defendant's possession which disclose the mode and materials of the construction of its cables; all of which matters and things are solely within the knowledge of the defendant, and unknown to the complainant. The defendant has demurred to the bill, and the main points made by the demurrer are—*First*, that the defendant, as a corpora-

tion, cannot be compelled to make a discovery; and, *second*, that the court should refuse to entertain the bill, because, under sections 724, 858, Rev. St., and the existing practice at law, discovery is no longer necessary, but the plaintiff can obtain in the suit at law all necessary evidence by an examination of the officers of the defendant and by compelling a production of all books or writings containing pertinent evidence.

Undoubtedly, a corporation cannot be compelled to answer under oath to a bill in equity. It answers only under the seal of the corporation. It is for this reason the practice has obtained of making the officers of the corporation parties to the bill and requiring them to answer the interrogatories. This, however, does not excuse a corporation from answering, and the complainant is entitled to an answer from a corporation as well as from an individual, although the value of the answer as evidence may not be worth the expense of the experiment. Although no officer or agent is made a party to the bill, it is still the duty of the corporation to cause diligent examination to be made, and give in its answer all the information derived from such examination; and if it alleges ignorance without excuse, a disposition on its part to defeat and obstruct the course of justice may be inferred which will justify the court in charging it with the costs of the suit. *Attorney General v. Burgesses of East Retford*, 2 Mylne & K. 35. There is nothing, therefore, in the fact that the defendant is a corporation to defeat the complainant's right to maintain a bill of discovery.

Under the existing practice in courts of law in this state, a plaintiff can obtain the evidence of a defendant upon the trial by examining him as a witness, and can obtain a production of books and papers both before and upon the trial. He can also compel a sworn answer to his complaint, and thus require the defendant to admit or deny under oath all the material allegations of fact in his complaint. The practice which thus prevails is the practice of the federal courts also, by force of sections 724, 858, 914, Rev. St. He cannot obtain the testimony of the defendant before the trial in an action pending in this court, although he can do so in the state courts, because section 861 of the Revised Statutes, as construed in *Beardsley v. Littell*, 14 Blatchf. 102, requires such testimony, unless taken *de bene esse* or by commission, to be taken in the presence of the court and jury at the trial. See, also, *Easton v. Hodges*, 7 Biss. 324.

The jurisdiction in equity for discovery originated in the absence of power in courts of law to compel a discovery by their own process, either by means of the oath of a party or by the production of deeds, books, and writings in his possession or control. But it does not follow, because courts of law now have power to extend such relief, that a court of equity should forego the exercise of an ancient and well-settled jurisdiction. No principle is more vigorously asserted by courts of equity than that they will not yield a jurisdiction once

legitimately exercised because an enlargement of the ordinary powers of courts of law has rendered a resort to equity no longer necessary. There can be no ebb and flow of jurisdiction dependent upon external changes. Being once legitimately vested in the court, it must remain there until the legislature shall abolish or limit it; for without some positive act the just inference is that the legislative pleasure is that the jurisdiction shall remain upon its old foundations. *Story, Eq. § 64.* Accordingly, it has been frequently held that a court of equity should not refuse to entertain a bill for discovery, although, by the enlargement of the jurisdiction and remedies exercised by courts of law, similar relief could be obtained by the complainant in his action at law. *Lovell v. Galloway*, 17 Beav. 1; *British Empire Shipping Co. v. Somerset*, 3 Kay & J. 433; *Shotwell's Adm'r v. Smith*, 20 N. J. Ch. 79; *Cannon v. McNab*, 48 Ala. 99; *Millsaps v. Pfeiffer*, 44 Miss. 805.

It is obviously desirable to ascertain the merits of a case at its outset, so far as may be practicable, when this can be done with the formalities and safeguards of regular procedure, rather than to await the result of an elaborate trial. The saving of time and expense which may thus be effected is beneficial, not only to the immediate litigants, but to the public also. There are, therefore, persuasive considerations why a party should be permitted to resort to a bill of discovery when the facts alleged in the bill reasonably indicate that such a remedy will conduce to the safe and convenient prosecution of his action or defense at law. It is the rule of the English courts that a party may maintain a bill of discovery in equity, not only when he is destitute of other evidence than the oath of the adverse party to establish his case, but also to aid such evidence or to render it unnecessary. *Montague v. Dudman*, 2 Ves. Sr. 398; *Finch v. Finch*, Id. 491; *Brereton v. Gamul*, 2 Atk. 241. In *Earl of Glengall v. Fraser*, 2 Hare, 99, it was said by Vice-Chancellor WYGRAM: "The plaintiff is, in this court, entitled to an answer from the defendant, not only in respect to facts which he cannot otherwise prove, but also as to facts, the admission of which will relieve him from the necessity of adducing proof from other sources." There are many American authorities to the same effect, among which may be cited *Marsh v. Davison*, 9 Paige, 580; *Peck v. Ashley*, 12 Metc. 481; *Stacy v. Pierson*, 3 Rich. Eq. 152; *Williams v. Wann*, 8 Blackf. 477.

Other authorities hold that in order to maintain such a bill it must appear affirmatively that the case of the party at law cannot be established by the testimony of other witnesses, or without the aid of the discovery he seeks. Such is the rule declared in *Brown v. Swann*, 10 Pet. 497, where it is held that the complainant must show by his bill that he is unable to prove the facts sought to be discovered by other testimony than that of the defendant. That was a case, however, in which the complainant sought general relief as well as discovery, thus seeking to withdraw the whole jurisdiction from the court

of law of a cause of action properly triable there and transfer it to a court of equity; and the decision is not applicable where the bill is for discovery merely. Story, Eq. Pl. § 324. The same observation applies to the case of *Drexel v. Berney*, 14 FED. REP. 268, decided in this court.

A consideration peculiar to a bill of discovery like the present, in which the complainant seeks a discovery concerning the infringement of a patent, should be adverted to. Courts of equity in patent causes sometimes exercise the power of granting to a complainant an inspection of alleged infringing devices as incidental to ordinary discovery. *Vidi v. Smith*, 3 El. & Bl. 969; *Morgan v. Seward*, 1 Webst. Pat. Cas. 169; *Russel v. Cowley*, Id. 468; *Shaw v. Bank of England*, 22 Law J. Exch. 26. Courts of law have no such authority, but power to do so was conferred in England upon common-law courts by 15 & 16 Vict. c. 83, § 42. Manifestly, cases may occur where the exercise of this power is necessary in order to prevent a defendant from profiting by his own artifice. The case made by the present bill is one where, if the defendant has appropriated the complainant's invention, it would be obviously difficult, if not impossible, to prove the fact unless an inspection were granted.

In reaching the conclusion that the demurrer should be overruled, the statutory provision (section 723, Rev. St.) which prohibits the federal courts from sustaining suits in equity where a plain, adequate, and complete remedy may be had at law, has not been overlooked. It has been decided in some of the states, where equity jurisdiction is restricted by a similar statutory regulation, that a bill of discovery will not be sustained when the common-law courts are competent to compel the disclosure sought. *Hall v. Joiner*, 1 S. C. 186; *McGough v. Insurance Bank*, 2 Ga. 151; *Riopelle v. Doellner*, 26 Mich. 102.

Section 723 was originally section 16 of the judiciary act of 1789, and was considered as declaratory merely as early as the case of *Boyce v. Grundy*, 3 Pet. 210. It may well be insisted that a discovery by a bill in equity affords a more adequate and complete remedy than a discovery upon the trial of the action at law by the testimony of an adverse party. This is certainly so if a bill may be resorted to in order to enable a party to dispense with the necessity of proof from other sources upon the trial of the suit at law. Power is conferred upon the supreme court to prescribe rules regulating the practice of the circuit courts in equity, and it is more properly the province of that court than of the circuit court to determine what, if any, innovations shall be made in the existing practice in consequence of the more enlarged powers now enjoyed by courts of law. Until some action by that court, this court should be slow to declare that a jurisdiction so ancient and so convenient as that of discovery, should be surrendered, or should depend upon the accidents of legislation respecting the practice of common-law courts.

HARGOOD and others v. ROSENSTOCK and others.

(Circuit Court, S. D. New York. February 7, 1885.)

1. PATENTS—AGREEMENT AND LICENSE—ASSIGNMENT OF PATENT—INJUNCTION.

A party who purchases a patent and takes an assignment thereof, with knowledge of an existing agreement and license granted to another, will be bound thereby, and may be restrained from violating the terms of the agreement.

2. SAME—SPECIFIC PERFORMANCE.

Equity does not generally decree specific performance of contracts relating to personal property, but will do so when the subject is the exclusive right to manufacture and sell a patented article, and in such a case will also enjoin the breach of a negative covenant.

In Equity.

J. C. Hueston, for complainants.

Dickerson & Dickerson, for defendants.

WALLACE, J. The complainants' motion for a preliminary injunction is founded on a bill which shows that in August, 1884, one Alice D. Hadlock, who was then the owner of a patent for an improvement in bustles, entered into an agreement with the complainants which is set out. By the terms of that agreement Hadlock, in consideration of certain royalties to be paid from time to time by the complainants, conveyed to them "the sole and exclusive right and privilege to manufacture and sell" the patented bustle anywhere in the United States, with the exception that they were not to sell the bustles in Chicago, and reserving to Hadlock herself the privilege to manufacture and sell the bustles in any part of the United States. By the second clause of that agreement Hadlock covenanted "not to form any stock company or copartnership for the purpose of manufacturing the bustle." By the third clause she agreed that complainants might prosecute infringers, and that any moneys which might be the outcome of any suits for infringement brought by complainants should belong to them. The bill further alleges that defendant Rosenstock asserts that October 4, 1884, he obtained an assignment of the patent from Hadlock, and is now the sole and exclusive owner thereof; that although complainants have fully performed their agreement with Hadlock the defendants assert that his rights under said agreement have been forfeited and terminated; and that the defendant Rosenstock is now manufacturing and selling the patented bustles in the city of New York. It is also alleged that Rosenstock had full knowledge of all the rights and equities of the complainants at the time he acquired the assignment of the patent. The prayer of the bill is for an injunction restraining Rosenstock from interfering with the complainants' rights and privileges under their agreement with Hadlock, and from making, selling, and using the patented bustles. The defendants claim that Rosenstock is now the owner of the patent, and admit that he purchased it from Hadlock with knowledge of the terms of the agreement between her and the complainants.

As the requisite diversity of citizenship exists between the parties, and is alleged in the bill to confer jurisdiction upon this court, the jurisdiction does not depend upon the patent laws, but upon general principles of equity. Assuming that the complainants did not acquire by their agreement with Hadlock the legal title to the patent, and therefore could not maintain an action for infringement except in the name of the owner or with the owner joined as a party, it is nevertheless true that they acquired an extensive beneficial interest in the patent. The second clause of the agreement shows that the right reserved to Hadlock was intended to be a personal privilege merely. The complainants, therefore, acquired the whole monopoly of the patent except in Chicago, and subject to the right of Hadlock to sell the bustles when she manufactured them herself or bought them from the complainants or their vendees. If Hadlock were now selling the patented articles in New York, not manufactured by herself or by the complainants, no doubt is entertained that she could be enjoined at the suit of the complainants. The complainants would not be restricted to a remedy at law for damages for breach of covenant. Equity will enjoin the breach of negative covenants whenever it would decree a specific performance of the agreement between the parties. Such a remedy is said by a commentator of authority to furnish the complement to the relief by specific performance. Bisp. Eq. § 461.

Although equity does not, as a general rule, decree specific performance of contracts relating to personal property this is because, ordinarily, adequate compensation in case of a breach may be obtained by way of damages at law. It is apparent that such a consideration cannot apply to an agreement like the present, because from the nature of the subject-matter it would be impossible in many cases to ascertain the damages which licensees might sustain by reason of being deprived of their rights to use an invention. Agreements for the assignment of a patent, and for delivery of chattels which can be supplied by the vendors alone, and for renewals of leases, are among those which will be specifically enforced, (*Binney v. Annan*, 107 Mass. 94; *Fry*, Spec. Perf. § 33; *Furnival v. Crew*, 3 Atk. 83-87; *Burke v. Smythe*, 3 Jones & L. 193; *Willis v. Astor*, 4 Edw. Ch. 594,) and are sufficiently analogous in their character to the present agreement to bring this case within the authorities. As Rosenstock had full knowledge of the complainants' equities these equities are impressed upon the title he acquired, and restrict his rights to the same extent as though the title remained in Hadlock. He can be compelled to do and not to do those things which Hadlock ought or ought not to do. He knew, or was bound to know, that if Hadlock intended by a sale of her patent to put it out of her power to perform her agreement with complainants the transaction was intended as a fraud upon them. He was either a party to this fraudulent design, or he intended to recognize complainants' rights. In either case he stands

towards the complainants in the place she would occupy if she now owned the patent, and must abide by the agreement.

An injunction is granted.

THE SIDNEY.¹

THE WILLIAM WORDEN.¹

PROVIDENCE WASHINGTON INS. CO. v. THE SIDNEY, and her Consort,
THE WILLIAM WORDEN.¹

(*District Court, S. D. New York. January 30, 1885.*)

1. INSURANCE—SUBROGATION—NEGLIGENCE—PAROL EVIDENCE.

A cargo of wheat, from the west to New York, was laden at Buffalo, through M. & Co., forwarders, on the canal-boat W., and insured by them as part of the price of freight agreed upon. At the beginning of the season, M. & Co. had taken out an "open policy" with the libelants "for whom it may concern," which required that each transaction under it should be entered in an accompanying policy book, or indorsed on the policy, stating the persons on whose account it was effected. A certificate payable to order was issued on this transaction to M. & Co., in their names, without the words "on account of whom it may concern," or equivalent words, and their names only were entered in the policy book. M. & Co. delivered the certificate, indorsed by them, along with the bill of lading signed by the captain of the W., which they also signed, to the agents of the owners, paying some \$200 prior charges, and also making further advances to the captain for the trip. They took from the master a separate bill of lading in which they were described as shippers, and in which the boat and cargo were consigned to their own New York agents, for their own protection. While the Worden was coming down the Hudson, in charge of the Sidney, both vessels belonging to the same owner, a steam-bue on the Sidney burst; the vessels drifted and stranded upon an island and the W.'s cargo was lost. The owners abandoned to the insurers, who paid them as for a total loss, and, claiming to be subrogated to the rights of the owners against the carriers, filed a libel against the S. and W. to recover for the loss. *Held*, that the consignees, the carrier, and M. & Co. had each an insurable interest in the cargo to its whole value; that a policy "for whom it may concern" assures all persons, having an insurable interest, that are intended to be covered by it, whether known to the insurers or not; that the conditions of the policy and the certificate in this case limited the general words of the policy, and that only M. & Co., the persons named, were "the assured" under the policy; and that the persons and interests assured could not be enlarged by parol evidence, and that the libelants, on paying the owners, as indorsees of the certificate, were subrogated to the rights of M. & Co. only.

2. SAME—CARRIERS—AGENCY—BENEFIT OF INSURANCE.

M. & Co., in procuring freight and making advances on account of the carrier, acted as his agents. The insurance effected by M. & Co. was intended for the benefit of the shipper, the carrier, and for themselves, and was effected upon the request and authority of both, there being no express reference to subrogation in the policy. *Held*, that such subrogation is a mere equity, depending on the actual relation of the various parties to one another, and is therefore subordinate to the equitable rights existing between a principal and his agent, who effects the insurance for the benefit of both; that the payment by the insurers in this case to the owners, was, in effect, the same as a payment to M. &

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar

Co., and by the latter to the owners; that on payment of the insurance to M. & Co., the carrier, as principal, could have compelled a payment by M. & Co., as his agents, to the owners, in discharge of their joint liability under the bill of lading; and therefore that no equitable right of subrogation existed through M. & Co., against the carrier, in favor of the insurers.

3. SAME—VOLUNTARY SETTLEMENT—NEGLIGENCE—BURDEN OF PROOF—PRIVIES.

The policy excepted loss through "want of ordinary care and skill in navigating said boats." *Held*, that if the case were one of doubt whether the loss happened by negligence or not, and if the carrier were not equitably entitled to the benefit of the policy, the insurers might have paid the owners of the goods with an assignment of all claims for damages to themselves, and then have prosecuted the carriers for indemnity, and recovered on proof that the loss was in fact due to negligence of the carrier; but that as the company has once paid the owner upon a voluntary settlement, as upon a loss under the policy, and the carrier being equitably entitled to the benefit of the policy, he is entitled to the benefit of the settlement made under it; and that such a settlement cannot be set aside except for duress, fraud, or mistake, and that the burden of proof, in an action to recover back the money from the carrier, was upon the libelants to show the fraud or mistake, and also that the loss was within the exception of the policy, and not a valid claim.

4. SAME—LOSS NOT COVERED BY POLICY.

And as the libel charged negligence, and the answer denied it, and averred that the stranding of the boat occurred under such circumstances as negated the charge of negligence, and no proof being offered by either party on this point, or that there was any fraud or mistake in the settlement, *held*, the libelant could not recover on the claim that the loss was not covered by the policy.

In Admiralty.

E. D. McCarthy, for libelants.

Hyland & Zabriskie, for respondents.

Brown, J. The libelants, at Buffalo, insured a cargo of wheat on board the canal-boat Worden, in tow of the Sidney, consigned to Armour, Plankinton & Co., of New York. One of the steam-flues of the Sidney having burst while she was coming down the Hudson river, she became unmanageable, and, as the answer states, drifted with the tide upon the rocks of Esopus island, whereby the cargo on board the Worden was lost. The cargo was abandoned to the libelants, who thereupon paid the consignees as for a total loss,—\$9,211.75,—and, claiming to be subrogated to the rights of the consignees against the carrying vessels for the loss of the wheat, filed this libel to recover the sum of \$6,175.89, the amount of the loss, after deducting the sum realized from the damaged cargo. The libel alleged that the stranding occurred through the negligence of the respondents, which the answer denies. On the question of negligence no evidence was given upon the trial. On that point both sides rested upon the pleadings, each claiming that the burden of proof was upon the other. Without reference to the question of negligence, however, inasmuch as the carrier had given a clean bill of lading binding himself to a delivery of the goods without exception or qualification, the libelants claimed that upon payment to the consignees they were subrogated to the benefit of the consignees' right of action for the loss of the goods against the carrier, as the principal debtor, for the non-delivery of the cargo; also that, upon the admissions of the answer, it was incumbent on the carrier to show that the stranding was without any fault on his

part, if that is material. The general principles of law invoked by the libelants are not denied, either as regards an insurer's right to subrogation, upon payment of a total loss, to the rights of the assured against any other persons primarily liable for such loss; or as regards the presumptions of negligence. The only question is as to the applicability of these principles to the facts of the case.

The contract of insurance, in this case, contains no express provision for any subrogation of the insurers to the rights of the assured on payment of the loss. In such cases, the right of subrogation, if any exists, being no part of the contract, does not depend upon the contract, or on the form of it; it is a mere equity to be worked out through the rights of the assured only, in his relation to other parties. If the assured has a legal right to indemnity for the loss against a carrier that has no legal or equitable right to the benefit of the insurance, then the liability of the carrier to the assured is regarded as the primary liability for the loss, and the liability of the insurer as secondary, and similar to that of a surety only. The insurer, on payment, is therefore held, in such cases, to be equitably entitled to stand in the shoes of the insured, and to recover such indemnity as the insured was entitled to recover against other persons having no right to the benefit of the insurance. *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584; S. C. 4 Sup. Ct. Rep. 566; *Hall v. Railroad Cos.* 13 Wall. 367; *Garrison v. Memphis Ins. Cos.* 19 How. 312. In the case of *Hall v. Railroad Cos.*, *supra*, the court say:

"In respect to the ownership of the goods, and the risk incident thereto, the owner [the assured] and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner [the assured] for the loss, he is entitled to all the means of indemnity which the satisfied owner [the assured] held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner [the assured.] Hence it has often been ruled that an insurer who has paid a loss may use the name of the *assured* in an action to obtain redress from the carrier whose failure of duty caused the loss."

As the right of the libelants to subrogation can only be claimed through the rights of the *assured*, the questions chiefly litigated were—*First*, who were insured under the policy in this case? and, *second*, was the owner of these vessels equitably entitled to the benefit of the insurance, so as to cut off any right of subrogation that the insurers might otherwise have had against him?

The facts are as follows:

The policy was issued in the name of Morse & Co., whose business is variously described as that of forwarders, carriers, transportation brokers, or, familiarly, scalpers. For convenience, I shall call them forwarders. They belong to a class of middle-men, long established in Buffalo, who handle all

the freight business there, as intermediaries between the boatmen and the owners of grain and produce, or their agents, who desire to ship it eastward. The forwarders see the consignors; agree upon the price of freight, which includes insurance; procure boats to take the grain upon the terms fixed; get a certificate of insurance and deliver it to the shipper along with the bill of lading, which they sign as well as the captain; pay prior charges, if any; make any advances necessary to the boatmen for the trip; and receive, for their services, from the boatman, a commission, usually 5 per cent. upon the amount of stipulated freight. The insurance companies that engage in this kind of insurance have provided a particular form of policy specially prepared for it. The shipper designates the company in which the insurance shall be effected. The forwarder, at the beginning of each season, procures from the various companies what is termed an "open policy," which is attached to a "policy book," in which are entered the particulars of each insurance under it. To effect a particular insurance, the policy and the policy book are taken to the office of the companies' agents, who enter in the policy book the particulars of the insurance as applied for, and thereupon issue and deliver to the forwarder a certificate stating that insurance is effected, under the policy, upon cargo on board the vessel, of the value designated, and on account of the persons named; the loss, if any, payable to "the assured, or order, and return of this certificate." The certificate is thereupon indorsed in blank by the forwarder and delivered to the shipper, with the bill of lading, also signed by the forwarder, as above stated.

The transaction in this case was in accordance with the general custom above described. The grain in question was in charge of Mr. Meadows, as agent of the consignees in New York. Morse & Co. applied to him in negotiating for its transportation, and agreed upon the rate of five cents per bushel, including insurance, which the shipper directed to be taken in the libelants' company. Morse & Co. thereupon placed the transportation with Capt. Wager, the owner of the Sidney and the Worden, and the grain was loaded upon the latter. When the cargo was loaded, Morse & Co. obtained the captain's bill of lading, and, having previously procured a certificate of insurance, delivered it, indorsed by them in blank, to Mr. Meadows, along with the bill of lading, which Morse & Co. also signed, paying him at the time \$200 for prior charges. The bill of lading recited Meadows as shipper on board the Worden, and provided for the delivery of the grain to the consignees in New York, without any exception or qualification, on payment of freight and prior charges, which were to be paid to Brooks & Co., the New York agents of Morse & Co.

The form of insurance was as follows: The "open policy" No. 772 states that the libelants, "by this policy, on account of Morse & Co., for whom it may concern, do *insure* the several persons whose names are hereinafter indorsed thereon as *owner, advancer, or common carrier*, on goods on his own boat, or boats belonging to others, from place to place, as indorsed hereon or in a book kept for that purpose, for the amounts, at the rate, and on the goods specified in said indorsement; no risk considered as insured until said *indorsement* is approved and signed." There are various provisions in reference to the lading and unlading, and the time allowed therefor. The risks assumed by the company are those of the seas, canals, rivers, and fire, and all other perils, losses, or misfortunes to the goods during said trip, "excepting perils, etc., from ice, jettison, theft, or from want of ordinary care and skill in lading or navigating said boats." There are numerous other provisions not material in this case. The certificate issued May 17th, on the application of Morse & Co., states that "Morse & Co. is insured under policy No. 772 in the sum of \$9,875, in board, cargo of boat Wm. Worden, on wheat \$9,875, at and from Buffalo to New York; loss, if any, payable to assured or order and return of this certificate."

The name of the consignees is not usually made known to the forwarder, and was not in this case known to him, until the grain was loaded. Upon the delivery of the bill of lading to the shipper, the name and direction of the consignee were written in the margin. When Morse & Co. obtained the certificate of insurance, they did not know who was to be the consignee. The agents of the insurers in Buffalo, who insured the certificate, and made the entry in the policy book, were fully acquainted with the established customs and usages in this business. They knew that Morse & Co. were forwarders, doing business in the manner above stated; they understood that the certificate of insurance applied for was designed to accompany a bill of lading of the goods in question; that Morse & Co. obtained the shipment of this cargo as agents of the captain; that they usually signed the bills of lading along with the captain; that they were accustomed to pay prior charges and to make advances to the captain; that the price of freight included insurance; and that Morse & Co. were paid for their services by the carrier by a commission on the amount of freight.

1. Upon the facts above stated, it is manifest that the consignees and the carrier, as well as Morse & Co., had each of them an insurable interest in the cargo to its whole value. Any person responsible for goods in his custody has an insurable interest in them to the extent of his liability. 3 Kent, *262; Hutch. Carr. § 429; 2 Duer, Ins. 49; Arn. Ins. § 107; *Hooper v. Robinson*, 98 U. S. 528, 538; *Savage v. Corn Exchange, etc.*, 36 N. Y. 655; *Harvey v. Cherry*, 76 N. Y. 436; *Waring v. Insurance Co.* 45 N. Y. 606; per GRAY, J., *Eastern R. Co. v. Relief, etc.*, 98 Mass. 423; *Com. v. Hide & L. Co.* 112 Mass. 136, 141. The consignee had an insurable interest, because he was owner; the carrier, because as carrier he was answerable to the owner for the full value; Morse & Co., because by signing the bill of lading they were equally responsible to the consignee for the safe delivery of the cargo. As respects the consignee, indeed, both Morse & Co. and Capt. Wager, by signing the bill of lading jointly, made themselves jointly liable as carriers; although as between themselves, Morse & Co. were but agents in procuring freight and making advances on account of Capt. Wager as principal. To secure themselves, Morse & Co. took a separate bill of lading from the master, in which they were described as shippers; and the boat and cargo were consigned to Brooks & Co., New York, as agents of Morse & Co. As each of these three parties had an insurable interest to the full amount, it was competent for Morse & Co., in taking out the insurance under an open policy "for whom it might concern," to insure for the direct benefit of all three; and had the *certificate* of insurance, besides the words "Morse & Co.," contained the additional words "on account of whom it may concern," like the original policy, there can be no question that under the proofs in this case the policy would have insured directly to the benefit of all three, and all of them been "the assured;" for the evidence leaves no question that Morse & Co. intended this insurance to operate in some form for the benefit of all. The agents of the insurance company so understood it; Morse & Co., in effecting the insurance, did it by the direct request of the consignee's agent;

and they as clearly acted, and were understood to act, on account of the captain also. The insurance premium, though paid by Morse & Co., was charged as an advance against the captain and the freight, and was allowed as such by the captain before the loss; and the evidence was that they acted for the captain's benefit as well as for their own. It is well settled that a policy "for whom it may concern" in such a case inures to the benefit of all persons having an insurable interest that are intended to be benefited by it, whether known to the insurers or not, and that such persons may sue upon the policy in their own names. A recovery by one against the insurers, in such cases, inures to the benefit of all, and bars any subsequent action by the others. *Hooper v. Robinson*, 98 U. S. 528; *Aldrich v. Equitable Safety Ins. Co.* 1 Woodb. & M. 272; *Henshaw v. Mutual, etc.*, 2 Blatchf. 99; *Fabbri v. Phoenix Ins. Co.* 55 N. Y. 129, 133; *Walsh v. Washington, etc.*, 32 N. Y. 427, 439; 1 Arn. Ins. 169, note; *Waters v. Monarch Assur. Co.* 5 E. & Bl. 870, 871.

The certificate of insurance issued in this case does not contain the words "on account of whom it may concern," or any equivalent words, but the names of Morse & Co. only. The necessary construction of the original policy with its conditions, is that, in order to make any particular transaction available under it, the names of the individuals on whose account any particular insurance under it is effected, must appear by indorsement on the policy, or by an entry made in the policy book. This condition of the policy is a perfectly lawful one, and, being clearly expressed, is controlling. In this case the name of Morse & Co. alone is entered in the policy book, without any additional words, as "for whom it may concern;" nor are they described as agents. The certificate is in accordance with this entry, and is made payable to Morse & Co., or their order. There is no language in it that can be so extended as to include other persons. Upon the written contract, therefore, "the assured," in the language of the policy, are Morse & Co. only. In such a case parol evidence is not receivable to vary the written contract, or to enlarge the interests of the persons directly assured. Arn. Ins. 169, note; *Mead v. Mercantile, etc.*, 67 Barb. 519. The indorsement of the certificate by Morse & Co. to the consignees, who were the owners of the cargo, effectually secured the latter. The consignees, in receiving payment of the loss from the insurers, received it, not as "the assured" under the policy, but as the indorsee of Morse & Co., pursuant to the terms of the contract, which provided for payment "to order." This was the mode agreed on and accepted for the security of all. It was a legal and effectual mode. In paying the consignees, the insurers paid them on account of Morse & Co., who were "the assured," pursuant to the indorsement; and hence the rights, if any, to which the insurers were subrogated upon this payment, were the rights of Morse & Co., and not the rights of the consignees, independently considered, against Capt. Wager and his vessels. In legal effect, the transaction is the

same as respects the insurers' rights of subrogation as if they had paid the whole loss to Morse & Co. as the "assured," and the latter had then paid the owners in discharge of their liability to them.

2. The relation of Morse & Co. and Capt. Wager, as between themselves, was, as I have said, that of agent and principal. Morse & Co., by signing the bill of lading, had indeed made themselves liable as principals to the consignees; but, as between themselves, their liabilities were those of principal and surety. The insurance effected by Morse & Co. was, as I have said, clearly shown by the evidence to have been intended as much for the benefit of Capt. Wager as for themselves. It was effected upon his request and authority, and the premiums paid by Morse & Co. were charged against the captain and freight. Capt. Wager was absolutely liable to Morse & Co. for this advance of premium, whether the freight or insurance money should ever be collected or not. The fact that these premiums, as part of the freight, were a lien upon the cargo and would be repaid to the captain or to Morse & Co. upon the delivery of the cargo to the owners, in case there were no loss of the cargo, is therefore immaterial as respects Capt. Wager's interest in the policy. The insurance company sufficiently understood all this, since it was in the usual course of business as fully understood by them. But the insurance did not cover any negligence of the carrier, because such negligence was expressly excepted by the terms of the policy.

Under such circumstances there can be no question that Morse & Co., on recovering from the insurance company the whole amount of the loss, would hold the money for the discharge of the joint obligation of themselves and Capt. Wager to the consignee, and to that extent they would be regarded as trustees of Capt. Wager, as the principal obligor; and Capt. Wager, as principal, would have the right to compel that application of the insurance moneys. This would not in any way conflict with any of the terms of the policy, or of the certificate; and the relation of the parties, and the circumstances that gave Capt. Wager this right, could, therefore, be legally established by parol. The situation is, in substance, analogous to the situation of mortgagor and mortgagee, where the latter, at the request of the mortgagor, insures the mortgaged premises in his own name, and at the expense of the mortgagee, and the insurance is intended for the benefit of both. In such cases, it has been repeatedly held that the mortgagor is entitled to the benefit of the insurance, and to have the amount paid to the mortgagee by the insurers applied in reduction of the mortgage debt; and that the insurers, consequently, have no right of subrogation thereto. *Story, J., in Carpenter v. Providence Ins. Co.* 16 Pet. 502-507; *Holbrook v. American Ins. Co.* 1 Curt. 193, 200; *Kernochan v. New York Bowery, etc.*, 17 N. Y. 428; *Waring v. Loder*, 53 N. Y. 581, 585; *Cromwell v. Brooklyn Fire Ins. Co.* 44 N. Y. 42, 47. But if the mortgagee insure his own interest, without any privity with the mortgagor, or if the insurance policy itself, in terms, provides for sub-

rogation to the mortgagee's rights upon payment of the loss, then the terms of the policy will prevail, and the mortgagor cannot have the benefit of the insurance, or compel the application of the payment to the reduction of his debt, and the insurers will be entitled to be subrogated to the mortgagee's rights against him. *Springfield, etc., v. Allen*, 43 N. Y. 389; *Excelsior, etc., v. Royal Ins. Co.* 55 N. Y. 343, 359; *Foster v. Van Reed*, 70 N. Y. 19; *Bank of S. C. v. Bicknell*, 1 Clif. 85, 91-93.

In this case there is no provision for subrogation in the insurance contract; hence any right of subrogation here, as previously stated, is a mere equitable right depending upon the actual relation of the other parties to each other. It is, therefore, subordinate to the equitable rights existing between a principal and his agent who effects the insurance for the benefit of both, and upon the account, and at the primary charge, of the principal.

It has been held that where the carrier expressly stipulates in the bill of lading that he shall have the benefit of any insurance effected upon the goods by the shipper, no subrogation against the carrier would arise in favor of the insurers upon their payment of a loss. *Carstairs v. Mechanics' & Traders' Ins. Co.* 18 FED. REP. 473; *Rintoul v. New York Cent. & H. R. R. Co.* 21 Blatchf. 439; S. C. 17 FED. REP. 905. If such a stipulation is upheld when inserted in the bill of lading, it must be equally valid when clearly proved to exist by extrinsic evidence.

This insurance having been obtained, in fact, for the benefit of Capt. Wager, as the principal carrier, and at his primary charge and request, as well as for the benefit of the agent, and also for the benefit of the consignees, through an indorsement of the certificate to them, and the insurers, in effect, knowing all the facts, Capt. Wager, as principal, has a superior equity to the application of the insurance moneys in discharge of his liability as carrier; and as this equity is incompatible with any subrogation to the rights of Morse & Co., as "the assured," against Capt. Wager or his vessel, no such subrogation can be allowed. The insurers' right being a mere equity to stand in place of Morse & Co., their right is subject to the same equities that affect Morse & Co. See *Kernochan v. Bowery*, 17 N. Y. 428; *Benjamin v. Saratoga Mut., etc.*, 17 N. Y. 415, 420; *Cromwell v. Brooklyn Fire Ins. Co.* 44 N. Y. 42, 47. As Capt. Wager, moreover, had the right to have the moneys paid by the insurers, whether it was paid to Morse & Co. or to their indorsees, applied in discharge of his, Capt. Wager's, obligation as carrier, the payment by the insurers operated in law as an extinguishment of Capt. Wager's liability; and hence no obligation of Capt. Wager to either Morse & Co., or to the owners, remained to which there could be any subrogation.

3. In what has been said above, reference has been had to a loss through causes covered by the policy. The policy, however, expressly excepts "want of ordinary care and skill in lading or navigat-

ing said boats." If the loss in this case happened through the negligence of Capt. Wager or the carrying vessels, or from the want of ordinary care, then the loss was not covered by the policy, and no one was entitled to recover upon it against the insurers. For the loss by such negligence the consignees could have held both Morse & Co. and Capt. Wager, under the bill of lading which both had signed; and Morse & Co., on paying the consignees, could have resorted to Capt. Wager and the carrying vessels for his indemnity, though he would have no valid claim upon the insurance company. If the case were one of doubt whether the loss happened by negligence or not, and the carrier were a stranger to the policy, having no equitable interest in the application of the insurance moneys, the insurers, instead of litigating their liability with the assured or their indorsees, might pay the owners of the cargo, as they did in this case, and take, as they did here, an abandonment of the goods, with an assignment of all claims for damages to themselves, and then prosecute the carriers for indemnity. *Excelsior, etc., v. Royal Ins. Co.* 55 N. Y. 343, 352. It is not material to the carrier, according to the authorities, with whom he litigates the question of negligence; and the insurers, in settling and paying such doubtful claims, are not mere volunteers. *The Monticello*, 17 How. 152, 155; *Insurance Co. v. The C. D., Jr.*, 1 Woods, 72; *Sun Mutual Ins. Co. v. Mississippi Val. Transp. Co.* 17 FED. REP. 919.

But here the carrier, as I find upon the facts, is not a mere stranger to the insurance. He is equitably entitled to the benefits of the policy; and hence entitled by an equity paramount to that of the insurers, and as against Morse & Co., or their indorsees, to have any moneys paid on account of the loss to either of them applied in discharge of his own obligation. Any voluntary settlement made by the insurers with either, inures to his benefit as much as to theirs.

A voluntary settlement and payment are in general binding, and cannot be ripped up and set aside except upon some of the special and recognized legal grounds therefor; such as duress, fraud, or mistake of fact. 2 Greenl. Ev. §§ 85, 120-123; *Elliott v. Swartwout*, 10 Pet. 137, 154; *Nichols v. U. S.* 7 Wall, 128. This rule applies not only to the immediate parties to the settlement, but in favor of others also that are in privity with them. The carrier here, being equitably entitled to the benefits of the policy, is clearly in privity with Morse & Co., the assured, and their indorsees. A settlement by the insurers with either inures directly to the benefit of all. It is as binding as respects all, as respects either; and it cannot be set aside, as against either, except upon some of the special grounds above referred to. Upon either of these grounds it might be set aside, doubtless, in an action against the carrier; but then only upon appropriate averments in the libel, and upon appropriate proof. And in such a case the whole burden of proof is upon the libelants. "It is incumbent upon them," say the court in the analogous case of

Hooper v. Robinson, (98 U. S. 540,) "to establish everything necessary to entitle them to recover, and they have no right to throw upon the defendant any part of the burden that belonged to themselves." See, also, *Transportation Co. v. Downer*, 11 Wall. 129, 134.

If the proofs had shown, therefore, that this loss occurred by such negligence as rendered the insurers not liable upon their policy, and that the insurers had settled with and paid the owners upon a clear mistake of the facts in regard to their liability, I should hold that the libelants would be entitled to maintain an action against the carrier, under an appropriate libel for that purpose. But this is not a libel of that character. No mistake or misapprehension of any of the facts at the time of settlement and payment is alleged in the libel, or suggested in the proofs; and as to the alleged negligence, no evidence has been given by either party. The libel charges negligence; the answer denies it, and states that the stranding occurred under such circumstances as negative the charge. These averments of the answer must be taken as a whole. The libelants having once paid the loss, as a loss covered by the policy, if they sought to recover back the amount paid in an action against a carrier equitably entitled to the benefit of the policy, on the ground that the loss was within one of the exceptions of the policy, and was paid under a mistake of fact, must sustain the entire burden of proof, and affirmatively show both their ignorance and mistake as to the facts, and that the loss was actually within the exceptions of the policy.

The libelants are not in the situation of mere naked assignees of a cause of action for damages held by the consignees against the carrier; nor do they sue in that character. It has been said that insurance companies have no power to purchase and sue on such claims independent of any question of their own liability. *Excelsior v. Royal Ins. Co.* 55 N. Y. 343, 357. Here they sue as insurers, who have paid the loss as a loss covered by the policy; and they now claim subrogation, in consequence of such payment, to a claim against the carrier. If, for the reasons above stated, they might be allowed to reopen the settlement made upon a mistake of fact, and prove that the loss was one not really obligatory on them to pay, because caused by negligence, the action must be one appropriate to that purpose, and the burden of proof in all respects be sustained by them. Neither the form of action nor the proofs meet these requirements; and the libel must, in every point of view, therefore, be dismissed, with costs.

THE REGULUS.

(Circuit Court, S. D. New York. January 6, 1885.)

1. CARRIERS BY WATER — SEAWORTHINESS — CHARTER-PARTY — OVERLOADING FRUIT CARGO—VENTILATION—PROXIMATE CAUSE OF INJURY.

Where a vessel was chartered to take a specified cargo of fruit, after loading with other cargo, and the contract contained a clause that the hatches should be taken off, "whenever practicable, as usual, for the ventilation of green fruit," and the master overloaded the ship, in consequence of which the hatches could not be removed, as usual, on the voyage, *held*: (1) that the charter-party obligated the ship to furnish the usual ventilation for a cargo of fruit, to the extent of which her ordinary facilities would permit, in view of the perils of the voyage; (2) that there was a breach of this obligation by overloading the ship so that it was not practicable to open the hatches as usual; (3) that the charterer was entitled to rely upon the contract, and was not precluded from recovering, because he had reason to apprehend when he delivered his cargo that the ship would be overloaded.

2. SAME—DECREE AFFIRMED.

Upon examination of the evidence, the decree of the district court (18 FED. REP. 380) in favor of libellant is affirmed, with costs.

In Admiralty.

Goodrich, Deady & Platt, for claimant and appellant.

Wm. A. Walker, for libellant and appellee. *Geo. A. Black*, of counsel.

WALLACE, J. The libel is filed to recover damages for the loss upon a cargo of oranges received by the steam-ship at Valencia, Spain, in January, 1881, to be transported to the city of New York. The *Regulus* sailed from Valencia, January 7th, and arrived in New York, February 9th, with the oranges rotten. The libel, after setting out the conditions of a charter-party executed between the libellant and the owners, avers that the steam-ship at the time she received the oranges was so stiff and deep in the water in consequence of cargo previously taken on that she was unseaworthy, unfit to encounter the weather of that season of the year, and rendered incapable of properly ventilating and caring for the cargo of fruit, and that the master and those navigating her failed to properly ventilate the same. The answer denies any lack of proper ventilation "so far as the circumstances of the voyage would permit;" alleges that the libellant well knew the quantity of cargo on board before the loading of his cargo; denies that the steam-ship was overloaded; denies all negligence; alleges that the damage to the fruit, if any, was occasioned solely by unusually stormy weather and heavy seas, whereby the voyage was protracted, and the usual ventilation became impracticable; and insists that the loss was within an exception in the bill of lading exempting the steam-ship from liability. An issue is made by the pleadings respecting the proper stowage of the libellant's cargo; but the ship was stowed by the libellant's stevedores, was properly stowed, and upon

the concessions of counsel at the hearing this issue is to be deemed eliminated from the case.

The proofs establish the following facts:

November 30, 1880, the *Regulus* then being in the Tyne, bound for Genoa, her owners entered into a charter-party at London with the libelant, conditioned that, "after loading her mineral at Elba for owner's benefit," she should proceed to Valencia, and load 4,400 cases of oranges for the libelant, "not above what she could reasonably stow and carry, above her tackle, apparel, provisions, and furniture," and being so loaded should proceed to New York. It was also conditioned in the charter-party that the hatches should be taken off "whenever practicable, as usual for ventilation of green fruit." After leaving Genoa the ship proceeded to Elba and took on 1,243 tons of mineral ore, the master giving notice by telegram to the libelant, December 23d, that she would sail that night for Valencia. She arrived there, January 1st. In the mean time the libelant had directed his oranges to be packed, boxed, and brought in from the country ready for shipment. January 5th, a bill of lading was executed between the libelant and the master containing a clause exempting the owners from liability from loss from all accidents of navigation and from negligence or default of master, mariners, or others. When she arrived at Valencia the steam-ship had on board 60 tons of coal, besides the 1,243 tons of ore taken on at Elba. Her carrying capacity was 2,000 tons. The libelant, who had been a ship captain and was familiar with the contingencies of the voyage and the conditions of safety for his fruit, objected to the master that the ship was too deeply loaded, and suggested that with bad weather the hatches would have to be battened down, and the fruit could not be properly ventilated. The master dissented from this view, and the libelant delivered the oranges, 4,326 cases, weighing about 300 tons. After the cargo had been delivered the libelant was informed that the ship would coal at Gibraltar. This had not been understood by him before; it was not contemplated by the terms of the bill of lading, and there was no uniform custom on the part of vessels coming from England to do so, although fruiterers generally on a voyage from the Mediterranean to New York were accustomed to coal there. The steam-ship left Valencia, January 7th, and proceeded to Gibraltar where on the 10th she took on 300 tons of coal. On January 11th she left there for New York. When she left Gibraltar her draught of water aft was 19 feet 6 inches, and forward was 17 feet 4 inches, a mean draught of 18 feet 5 inches. She carried a Plimsoll mark, according to the provisions of English acts of parliament, which is a disk one foot in diameter with a line drawn horizontally through the center, painted on the outside of the vessel amid-ship. The center line fixes the point beyond which according to the judgment of the owner the vessel is not to be loaded deeper. When she left Gibraltar her water or load line was about 10 inches below the center line of the Plimsoll mark, and she had 4 feet 4 inches of free-board.

According to Lloyd's rules, however, the utmost mean draught of water which she could have, consistently with safety to herself and any cargo, was 18 feet 5½ inches, and a free-board amid-ship of not less than 4 feet 5¾ inches. Vessels carrying fruit customarily allow a free-board of a couple of feet more than the free-board for ordinary cargo in order that the hatches can be opened without danger from water to secure the necessary ventilation of the fruit and prevent it from heating. The coal taken on at Gibraltar increased her draught something over a foot, but when she left Valencia it is safe to assume she drew at least a foot more water than was customary, in view of the cargo she was to carry and the reasonable contingencies of the voyage. The steam-ship was provided with the ordinary facilities for ventilation, and in addition with booby hatches such as are usually provided for the ventilation

of fruit cargoes, and which were constructed under the supervision of libellant at Valencia. These booby hatches were built at the after-part of the holds, Nos. 2 and 5, in which the oranges were stowed. After leaving Gibraltar the steam-ship met with unusually tempestuous weather and heavy seas, which lasted with occasional intermissions of a day or two at a time until she arrived at New York, February 9th. On January 12th one of the booby hatches was carried away by the seas, and on the 13th the other was carried away. After that the hatches were covered with tarpaulins, and were opened for ventilation from time to time, and wind-sails were used for that purpose; but owing to the heavy seas constantly shipped by the steamer the hatches were not kept open sufficiently for the proper ventilation of the oranges. The voyage of the ship was protracted 10 or 12 days beyond the usual time required by reason of the heavy gales and seas she encountered, and because in consequence of being so deeply laden she was obliged materially to decrease her speed.

When the oranges were delivered on board they were in good condition for shipment, and with proper ventilation would have arrived in good condition notwithstanding the length of the voyage. When the ship left Gibraltar she was too deeply laden by two or three feet to carry her cargo of oranges with a due regard to necessary ventilation in case of encountering heavy seas. Her trim was gradually lightened as she consumed her coal, but when she arrived at New York her draught of water aft was 18 feet 10 inches. If she had had two more feet of free-board she would not have shipped such heavy seas, and it would have been practicable to open her hatches oftener and ventilate her fruit more efficiently than was done. Two other steam-ships, the Navigation and the Rossend Castle, left Gibraltar about the same time she did; the Navigation bound for Boston, and the Rossend Castle for New York. They encountered the same weather, substantially, as did the Regulus, but were able efficiently to ventilate their cargoes of oranges and deliver them in good order. The Navigation sailed from Gibraltar, January 10th, and arrived at Boston, February 1st. Her voyage was protracted about three days by the very exceptional weather she met with. Her booby hatches were carried away by the heavy seas. She carried a clear side of seven feet, and shipped a great deal of water during the passage; but, although a large part of the time she was unable to take off her hatches, she managed to keep the lee corners open for ventilation. Owing to the want of sufficient ventilation the libellant's oranges became heated upon the voyage and rotted, whereby he sustained a loss in the sum of \$10,144.99, which sum represents the difference between the amount realized by the sale of the oranges at public auction in New York, January 10, 1881, and the amount he would have realized over the current prices at that time if the oranges had arrived in good condition.

In considering the proofs, the question which has presented the most difficulty is the one of fact, whether, in view of the severe weather encountered by the steam-ship, it would have been practicable, if she had not been overloaded, to keep the hatches open sufficiently for the ventilation of the fruit. No doubt is entertained that, with the usual free-board, the steam-ship would not have shipped such heavy seas, and that the hatches could have been opened more frequently than was practicable when she was loaded down almost to the limit of her draught. But the weather was extraordinary, and the doubt is whether, with two feet more of free-board, she would not still have been under the necessity of keeping her hatches closed so much of the time as to preclude the necessary ventilation. It is incumbent upon the libel-

ant to show affirmatively that the loss arose solely from the breach of the obligation of the charter-party; and he cannot prevail by raising a doubt upon this point. It does not help him that in such a case the evidence is almost wholly in the control of those in charge of the ship, and affords him a frail reliance in establishing fault on their part; but it is not unreasonable to hold that where it is shown that the ship disregarded the practice which experience had established, and which is therefore to be deemed essential to a discharge of her whole duty, that circumstance is *prima facie* sufficient to account for the result, and to shift upon the ship the burden of a satisfactory exculpation. Certainly the proofs are not convincing that the hatches could not have been opened efficiently for ventilation if the ship had been in light trim and carried the usual free-board. The result that followed was just what experience indicated as likely to follow in case of heavy seas. The log of the first officer is well calculated to convey the impression that the vessel had to contend with tremendous seas throughout nearly the entire voyage; but an analysis of the testimony of the master and of the first officer; and a comparison between this log and the engineer's log materially modifies this impression. For instance, the log (January 11th) has this entry: "Ship rolling heavily, and shipping quantities of water over all;" while the master, with the official log in his hand, says the first bad weather was on the 13th. The first officer also testifies that there was nothing extraordinary in the character of the wind or sea on the 11th. The fact that the Navigation encountered substantially the same perils with safety to her cargo, fortifies the theory that the loss is attributable to the fault of the ship rather than to the perils of the voyage.

The cause of action being founded on the breach of the charter-party the remaining question is whether the hatches were "taken off whenever practicable, as usual for ventilation of green fruit." This covenant obligated the ship to furnish the usual ventilation necessary for such cargoes to the extent which her facilities would permit. The hatches were to be taken off whenever practicable, in view of the facilities of the ship as they existed at the time the charter-party was executed and the vicissitudes of the voyage. It was not contemplated by the charter-party that the ship should be at liberty to carry other cargo of a character to cripple the ordinary ventilating facilities of the ship. The hatches may have been taken off to the extent practicable in view of the overloaded state of the ship on her voyage and the weather she encountered; but they were not taken off "as usual" because the overloaded condition of the ship rendered this impossible. The ship could not perform her contract with the libellant because those in charge had put it out of her power to do so. If there was negligence on the part of those in charge in not removing the hatches as often as they should have been, the ship is not exonerated by the exception in the bill of lading. Conceding that the contract is to be

interpreted and effectuated according to the law of England, (*Moore v. Harris*, L. R. 1 App. Cas. 318-332; *Woodley v. Michell*, L. R. 11 Q. B. Div. 51,) and that it was competent by the stipulation of the parties to exempt the ship from liability arising from the negligence of those in charge, yet that stipulation must give way to the expressed contract to take off the hatches whenever practicable. Both cannot stand together, and any doubtful question of construction should be resolved against the carrier. *Hayn v. Culliford*, L. R. 3 C. P. Div. 410; L. R. 4 C. P. Div. 182; *Taylor v. Liverpool*, L. R. 9 Q. B. 549.

It is insisted for the appellant that the libelant cannot recover because he knew the ship was overloaded when he delivered his cargo to her. If his cause of action was one for negligence it would be pertinent to inquire whether there was negligence on his part which contributed to the loss, and if so, whether the loss should fall upon him or be apportioned. There is no principle, however, which precludes one party from a recovery for the breach of an express contract because he had reason to suppose at the time the contract was made, or during the time it remains executory, that the other party could not perform. He has a right to rely upon the contract and to substitute the promise of the other party for his own fallibility of judgment.

In reaching the conclusion that the decree of the district court was right, the theory that the delay in the voyage which was attributable in part to the overloading of the ship contributed to the spoiling of the fruit has not been adopted. Possibly with a shorter voyage the lack of proper ventilation might not have been so injurious to the fruit; but this would seem to be conjectural merely; and when the oranges were shipped they were unripe and ought to have kept 40 or 50 days with ordinary care. The testimony introduced for the first time upon this appeal has not materially changed the case as made in the district court; and that which has been adduced to show that the oranges when shipped were unduly ripe is rejected as utterly unworthy of credit.

A decree is ordered for the libelant for \$10,144.99, with interest from January 10, 1881, with the costs of the district court, and of this appeal.

THE PILOT BOY.

(District Court, D. Maryland. February 9, 1885.)

1. EXCURSION BOATS—CARRIERS OF PASSENGERS—DUTY TO PASSENGERS.

The owners of excursion boats used for night excursions are bound to use proper precautions to guard against the natural mistakes of passengers while on board.

2. SAME—NEGLECT TO SUFFICIENTLY LIGHT A STAIR-WAY.

Where there was an open door-way from which steep stairs descended to the hold, which was in such a location that it was likely to be mistaken by a passenger for the stairs which ascended to the upper deck, *held*, that the owners of the boat were guilty of negligence in not having it so effectually lighted as to warn a passenger making such a mistake as soon as he faced, and was about to step into the opening.

In Admiralty.

A. Stirling Pennington, for libelant.

H. V. D. Johns, for respondent.

MORRIS, J. This is a libel *in rem* instituted by a passenger who received injuries from falling down a stair-way on the steam-boat Pilot Boy while on an evening excursion from Baltimore to Keller's Pavilion, in June, 1884. There is some conflict of testimony with regard to whether or not the libelant was under the influence of drink at the time of the accident. I take it that even on such an excursion as this, and with a bar on board, the presumption still remains that the excursionist was sober, and, aided by that presumption, I think the weight of evidence is decidedly with the libelant. The account given by the libelant and his companion of what they had done during the afternoon and while on board is quite inconsistent with his having had enough drink to affect his conduct or his care for his own safety. I find the fact to be that the libelant was sober.

On the Pilot Boy there is on the forward part of the main-deck a structure, in the center of the ship, containing on one side a door-way and stairs leading up to the upper deck, and on the opposite side containing a door-way and stairs leading down to the hold. There is across the whole deck, and extending from each side of this structure to the port and starboard edges of the boat, a partition or bulk-head, with an entrance door on each side. Directly by the entrance door on the port side there is the door-way and stairs ascending to the upper deck, and similarly placed, directly by the entrance door on the starboard side, there is the door-way and stairs descending into the hold. The account of the accident, given by the libelant, is that he was coming from the stern of the boat along the starboard alley-way, intending to go up again onto the upper deck, where he had before been sitting, and thinking that the stairs on both sides lead to the upper deck, he stepped into the starboard door-way, which was open, and the place being entirely dark, and not finding the ascending steps, he fell down to the bottom of the steep descending stairs,

and was injured. It is admitted that the door was fastened open, and, unquestionably, if the opening was not sufficiently lighted, it was in that location a dangerous opening; so that I think the case turns, in great measure, on the question whether the lighting was sufficient for such a place on an excursion boat. There was a bright light with a reflector, fastened against the after-most side of the structure and in the center of the boat. But this was not against the side of the structure in which this door-way was, but at right angles with it and around the corner from it. Obviously, this light did not serve to illuminate the door-way in question. There were lights in the bar, some distance aft, and on the opposite side of the alley-way, which ran fore and aft, and there was a light of some sort on the opposite side of the alley-way, say eight to ten feet distant from the door-way, but not placed directly opposite to it.

There is a conflict of testimony as to whether there was a light in the hold at the foot of the stairs. The libelant says there was no light at all in the hold. The witnesses of the steam-boat say that there was usually placed on a bench near the foot of the stairs a small light for the use of the firemen who were obliged to use this stair-way, and who were the only persons entitled to use it. If this light was there, it was such a light as would very dimly illuminate the stair-way, and as there was no fixed place for it, it may have been placed well towards the after-end of the bench. Since the hearing I have visited the steam-boat, and feel quite sure that I now understand the location of the doorway and its surroundings. It is plain that from its position an ordinary passenger might in the night-time readily suppose that this door-way was an opening leading to the upper deck, and the question to be determined is, was the lighting sufficient to warn a person of ordinary prudence, who was acting under that reasonable impression, what its real character was in time to prevent his stepping into it? Undoubtedly it was lighted sufficiently for men accustomed to the boat, for they know its real character, and would need but very little light; but I take the law to be that owners of excursion boats carrying pleasure-seekers on a night excursion are bound to guard against the natural mistakes of such passengers. The law is that carriers of passengers are not liable, if injuries happen from sheer accident or misfortune, where there is no negligence or fault, or where no reasonable caution, foresight, or judgment would have prevented the injury; but the carrier is liable for the smallest negligence of himself or his servants. I think it was a natural mistake for any landsman to make, to suppose that this opening led to the upper deck, and I think that when it was left open the lighting should have been sufficient to give instant warning to such a person of his mistake. For a boat carrying a crowd of excursionists at night, I do not think the lights on the main deck were sufficient to give such warning, and I do not think the dim light placed on the bench in the hold near the foot of the stairs made them sufficient. There should have been a

good light inside the opening, placed high enough to catch the eye of the passenger as soon as he faced the opening. It may be said that in a narrow opening with steps leading directly down, and with the ascending steps from the opposite side close overhead, and inclining towards the opening, such lighting would be difficult. This may be so. I can appreciate the difficulty, and no doubt the safer and better plan would be to have some obstruction across the door-way to check any one attempting to enter.

The boat's officers state that the door must be kept fastened open to give ventilation to the firemen in the hold, and this being so, the surest precaution against the dangerous mistakes of excursionists at night would seem to be to put some physical obstruction across it, and this would be more effectual than any amount of lighting. I have heard and considered with attention the testimony of the experienced steam-boat men who were called as experts, and who testified that in their judgment the precautions used were sufficient, and in holding that they were not, I do not, of course, mean to assume that the court, by any sort of judicial legislation, may declare that steam-boats must be constructed and furnished according to plans which the court may think most judicious, but I do consider that the testimony of nautical men as to what is sufficient to prevent such accidents must be received with some allowance, for this reason, that it is difficult for seafaring men to comprehend how stupid an ordinary landsman or excursionist is with regard to the construction of a boat, and how liable he is to become confused with regard to the location of the stair-ways leading from one deck to another.

Now, with respect to a boat used for night excursions, and particularly one which has a bar on board, and is intended for more or less merry-making, the rules of law governing carriers of passengers should not be relaxed, and they should be required to guard against the natural and general ignorance and mistakes of those they invite on board as passengers. In this case, as the neglect for which I pronounce the steam-boat in fault is not one of gross or willful negligence, the recovery should be strictly confined to a reasonable compensation. The libellant proved no actual loss of earnings or expenditures for medical attendance. He was laid up in the city hospital nine weeks, and was on crutches two months,—say eighteen weeks in all.

A decree may be drawn for \$300 and costs.

**BROUGHTY v. FIVE THOUSAND TWO HUNDRED AND FIFTY-SIX BUNDLES
OF STAVES, etc.**

(Circuit Court, N. D. New York. January 30, 1885.)

CARRIERS OF GOODS—LOSS OF GOODS—EVIDENCE.
Decree of district court, 21 FED. REP. 590, affirmed.

In Admiralty.

Marshall, Clinton & Wilson, for appellant.

Cook & Fitzgerald, for appellee.

WALLACE, J. Under the allegations in the libel, the libelant cannot be permitted to deny that he received on board his schooner all the cargo described in the bill of lading. But the claimant, the consignee, accepted the cargo without insisting upon a tally by the carrier, and without making one himself, to ascertain whether all was delivered that was shipped. Part of the cargo after its delivery to the consignee was permitted to remain exposed on the dock over night. After the cargo was transferred from the dock to the cars the cars were sealed, and the cargo remained in them for about six weeks when a tally was made, and it was discovered that part of the cargo described in the bill of lading was missing. The acceptance of the cargo by the claimant without objection was an acknowledgment that the carrier had performed his contract, and implied a promise to pay the freight, which the consignee was instructed to pay by the bill of lading upon delivery. The testimony for the libelant tends to show that all the cargo received was delivered as strongly as the testimony for the claimant tends to show the contrary. The affirmative of the issue is with the claimant, he having accepted delivery of the cargo. His proofs are as unsatisfactory as those of the libelant. It is as reasonable to infer that the missing part of the cargo was stolen upon the dock after it had been delivered to the consignee as that it was lost or misappropriated on the voyage. The decree of the district court is affirmed, with costs.

RAWSON and others v. LYON and others.¹

(District Court, S. D. New York. January 28, 1885.)

1. REPRESENTATIONS—FRAUD—MUTUAL MISTAKE.

The owners of the brig *D.* filed a libel against the charterer to recover a balance of charter money. The charterer answered that "at the time of the execution of the charter-party it was represented, warranted, and agreed by the master and agents of the brig that she was of 247 tons register, and would carry 2,700 barrels, or from 290 to 300 tons of logwood, on the faith of which the charter was accepted, but which agreement was by mistake inadvertently omitted from the charter;" and that the vessel brought home only about 225 tons of logwood. The written charter contained a clause that the vessel was of 247 tons register, which was true; and it was proved that she carried on her outward voyage 2,900 barrels, and on the homeward voyage brought only 225 tons of logwood, because so bulky that more weight could not be got under deck.

2. SAME—EVIDENCE.

Evidence in support of the allegation of the answer as to the representations was taken under objection to its admissibility, and contrary evidence was offered in behalf of the brig.

Held, that if the answer had charged fraud, the evidence would have been admissible under recent authorities, (*contra*, *Baker v. Ward*, 3 Ben. 499,) and so if a mutual mistake of fact were charged; that on the evidence there was no mutual mistake of fact, or any such representations as were meant or understood as a warranty that the brig would carry 290 or 300 tons of logwood.

3. SAME—EVIDENCE MUST BE SATISFACTORY.

If the rule which makes the writing the highest evidence of the contract, and excludes evidence of prior conversations to vary it, or to attach to it new conditions or obligations, is to be relaxed in cases of fraud, actual or constructive, or of mutual mistake, the evidence showing such fraud or mistake must be entirely clear and satisfactory, and in cases of doubt the writing must prevail.

In Admiralty.

Benedict, Taft & Benedict, for libelants.

Scudder & Carter and Geo. A. Black, for respondents.

BROWN, J. This libel *in personam* was filed to recover the sum of \$515.83, a part of the sum of \$2,150, agreed to be paid by the respondents for the charter from the libelants to the respondents of the brig *Dauntless*, for a voyage from New York to Port au Prince and back in November, 1882. The answer alleges that "at the time of the execution of the said charter it was represented, warranted, and agreed by the master and agents of the brig that she was of 247 tons register, and would carry 2,700 barrels, or from 290 to 300 tons, of Jamaica log-wood; on the faith of which the charter was accepted, but which agreement was, by mistake, inadvertently omitted from the charter." Upon the trial it was proved that the brig, upon her outward voyage, took 2,940 barrels; but on her return voyage, though fully loaded, she could take but 225 tons of logwood, instead of 290 or 300 tons. Considerable testimony was also offered to show that in the negotiations leading to the execution of the charter-party, the brig was represented by her captain to be able to take from 290 to 300 tons of

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

logwood. This testimony was objected to as inadmissible to vary the written charter, which stated the tonnage correctly, but contained no representation as to the number of barrels, or the tons of logwood, that she could take. The difficulty was not in her ability to carry 300 tons weight, but in her capacity to stow so much logwood between-decks.

The answer does not allege any fraud, nor that the representation alleged was fraudulently made, but only that the representation was untrue. The evidence is not even conclusive that the brig could not have carried 290 or 300 tons of logwood, if the wood were of sufficiently large sticks, or if it had been sawed so as to be stowed compactly. Had the answer charged false and fraudulent representations, as the means whereby the respondents were induced to enter into this charter-party, I should have regarded the testimony offered as admissible according to weighty authorities. *Cooper v. Schlesinger*, 111 U. S. 148, 152, 155; S. C. 4 Sup. Ct. Rep. 360; *Johnson v. Miln*, 14 Wend. 195; *Brown v. Tuttle*, 66 Barb. 169; *Thomas v. Beebe*, 25 N. Y. 247; *Bennett v. Judson*, 21 N. Y. 238; *French v. Newgass*, L. R. 3 C. P. Div. 163; 1 Story, Eq. § 193. So if there were any mutual mistake of fact which was the foundation of the contract. *Funch v. Abenheim*, 20 Hun. 1. In the case of *Baker v. Ward*, 3 Ben. 499, however, evidence similar to that offered in this case was excluded, even where the answer expressly alleged false and fraudulent representations.

I do not deem it necessary to consider this question anew in this court in the light of subsequent authorities, inasmuch as upon the evidence, which was provisionally received concerning the conversations between the parties prior to the execution of the charter-party, I must hold that no mutual mistake of fact is established, nor any such representations as were either meant or understood to be a warranty that the brig would carry 290 or 300 tons of logwood. *Hawkins v. Pemberton*, 51 N. Y. 198; *Durham v. Fire & Marine Ins. Co.* 22 FED. REP. 468.

On the part of the libelants the evidence is that the captain said that the brig had never carried any logwood, though he had once been to Jamaica for logwood with another vessel; but that the Dauntless would carry 300 tons of logwood "if they could get it aboard." The broker testified in behalf of the respondents that the master said that the Dauntless had brought 300 tons of logwood from Hayti. It seems to me more probable that there was error in the recollection of the broker as to the precise language of the master, than that the master stated the downright falsehood of which the broker's testimony, if true, would convict him. The witnesses on this point are evenly balanced, and the circumstances favor the respondent's version of the conversation. The omission from the charter-party, of a positive stipulation for the carriage of 290 or 300 tons, well agrees with the libelants' testimony concerning the condition attached to the statement,

viz., that she would carry 300 tons "if it could be got aboard;" while, if made in the positive form alleged by the broker, there is no reason why the charter-party, drawn up by himself, should not have contained it. Moreover, within a week after the execution of the charter-party, in a conversation between the broker and the master, the broker desired the master to saw the logwood in order to have it packed more compactly, and thus be able to bring as large an amount as possible; and he offered to contribute something for that purpose. But the master declined to do anything about sawing, as not incumbent on him. Such a conversation seems to me less likely to have occurred had it been understood that the brig was at all events to bring from 290 to 300 tons of logwood, than if the amount she would bring was understood to be dependent upon her capacity for stowage. If the rule of law which makes the writing the highest evidence of the actual contract between the parties, and which excludes evidence of prior conversations to vary it, or to attach to it new conditions or obligations, is to be relaxed in cases of fraud, actual or constructive, or in case of mutual mistake, the evidence showing such fraud or mistake must be entirely clear and satisfactory to the court; and in case of doubt, at least, the writing, as it stands, must prevail.

The libelants are, therefore, entitled to the balance due according to the terms of the charter-party, with interest and costs.

THE S. B. BAKER, etc.¹

(District Court, S. D. New York. January 31, 1885.)

SALVAGE—FIRE IN COTTON—TOWAGE.

A fire broke out during a westerly gale among the cotton bales which composed the cargo of the lighter Baker, lying along-side the Servia. The slip was filled with boats, which were imperiled by the fire, and the fire could not be extinguished there. Upon signal from the superintendent of the wharf, the tug L. towed her out from the slip into the river, and played upon the fire with a small hose until the arrival of two city fire department tugs. The L. then towed the three vessels to a place convenient for taking out the burning cotton. The value of the cotton saved and sold was \$29,000, the value of the lighter about \$3,000, and the tug L. was worth about \$14,000. There were no special circumstances of danger to the salvors or their tug, and the service was completed in about two hours. *Held*, that \$750 was a proper salvage award.

In Admiralty.

Alexander & Ash, for libelants.

Butler, Stillman & Hubbard and *Wilhelmus Mynderse*, for claimants.

BROWN, J. At about 1 p. m. on the twenty-fifth of September, 1883, a fire was discovered among bales of cotton on the lighter S. B. Baker,

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

lying in the slip on the southerly side of pier 40, North river. The wind was westerly, blowing nearly a gale. The lighter lay near the end of the slip, inside of the steam-ship *Servia*. The fire had burst out ablaze around the wood-work of the mainmast, and the blaze ran up along the canvas, which hung upon the mast. The pier was well supplied with means for putting out fires, and a hose was very speedily run from the pier, across the *Servia*, to play upon the fire. Another hose was also got out from the *Servia*. The slip was full of vessels, and the superintendent, fearing danger from an increase of the fire in a high wind, called for aid to move the lighter away. The libelants' tug *Lyndhurst* answered the call; came along-side the lighter about five minutes after the fire broke out; attached his lines to her; pulled her out of the slip; and then took her along-side further into the river, playing upon her with a one-inch hose, which was aboard. Very soon the steam fire-engine boat *Zophar Mills*, belonging to the city fire department, came along-side of the *Lyndhurst*, threw her hose across her, and poured several heavy streams upon the burning cotton. As fire among cotton bales cannot be thoroughly extinguished without either submerging them or unloading, it became necessary to take the lighter to some vacant wharf, where the bales could be rolled off, and the fire among them completely put out. The *Lyndhurst* was therefore directed to go ahead, and take the boat in tow up-river till a suitable place could be found. The *Lyndhurst* then left the side of the boat, proceeded ahead, and took the lighter upon a hawser, the *Mills* being along-side of her. About the same time, another fire-boat belonging to the city fire department (the *Havemeyer*) came up, and went along the other side of the lighter; and the three boats were towed by the *Lyndhurst* to Fifty-seventh street, where the bales were rolled off, broken open so far as necessary, and the fire extinguished. The value of the cotton saved was \$29,000; the value of the *Baker*, about \$3,000; and the *Lyndhurst* was worth about \$14,000.

The claimants contend that a very small sum only, if anything, should be allowed for the salvage services of the *Lyndhurst*, on the ground that the lighter originally lay in a good place for being drenched with water to put out the fire; and that her removal was directed, not for her own safety, but for the safety of other vessels. There were no proper means, however, for extinguishing the fire where the lighter lay in the crowded slip. Though the fire might be subdued, it could not be put out there. There were no means there of unloading the bales; and in the high wind then prevailing, the fire might break out anew at any moment, and in remaining there she would be a source of constant danger to other vessels. As it was, one other lighter caught fire. The removal of the barge was, therefore, a matter of necessity; both to put out her own fire and prevent its spreading.

The services of the *Lyndhurst* were clearly salvage services. They were rendered promptly and efficiently. Her crew were active and energetic in removing the lighter; in playing upon her with their

own hose till the Mills came up; and then in assisting the Mills; and, finally, in towing all three boats to Fifty-seventh street. The Lyndhurst, though scorched and blistered, can hardly be said to have been in actual danger. The whole time occupied was about two hours. Considering all the circumstances, I think \$750 will be a proper sum to award as salvage; one-half to the boat, and the rest to be divided among the captain and crew in proportion to their wages.

THE TALISMAN.

(District Court, E. D. Pennsylvania. February 16, 1885.)

PILOTAGE—REFUSAL TO ACCEPT—ACTION BY PILOT TO RECOVER.

To justify recovery of a claim for pilotage by a pilot whom a vessel has refused to receive, the court must be fully satisfied that the respondent refused or neglected to take such pilot, as provided by the statute.

In Admiralty.

On April 12, 1883, in the night-time, the bark *Talisman*, bound for Philadelphia, while off the Whistling Buoy, Delaware bay, signaled for a pilot, and such signal was answered by the *Henry Cope*, which followed her up the bay, and overtook her as she was about to anchor. The pilot tendered his services, and being told by the master that he intended to wait till daylight and see if there were any tug-boats about, went off and did not return. Subsequently he sued for pilotage fees.

Curtis Tilton and *Henry Flanders*, for libellant.

H. G. Ward, *M. P. Henry*, *J. Rodman Paul*, and *C. M. Hough*, for respondent.

PER CURIAM. To justify recovery of the claim the court must be fully satisfied that the respondent *refused*, or *neglected*, to take a pilot, as provided by the statute. While it is true that the liability imposed by the statute for such refusal or neglect is not, technically, a penalty,—as the courts have decided,—its operation and effect, when applied, is so far in the nature of a penalty that it should not be applied except in cases of willful refusal or neglect. Did the respondent willfully—that is to say, purposely or intentionally—refuse or neglect in this instance? If he did not absolutely refuse the services tendered, he certainly neglected to avail himself of them; and I do not see, therefore, how he can escape liability. It seems quite plain that he intended, from the start, to avoid taking a pilot if he could find a tug. He appears to have been laboring under the misapprehension that no obligation to take a pilot rested on him after reaching the point where he anchored. What he said to the pilot is consistent with this view, and seems to be inconsistent with any other. A decree must be entered for the libellant, with costs.

THE AMSTERDAM.¹

(District Court, S. D. New York. February 13, 1885.)

1. LIMITATION OF LIABILITY—INJUNCTION.

In proceedings to limit the liability of a vessel, an injunction may issue to restrain the prosecution of suits in a state court.

2. SAME—PERSONAL INJURY.

Claims for damages for personal injuries arising out of the stranding of a vessel are within the provisions of the statute limiting liability.

In Admiralty.

Curzman & Yeaman, for the motion.

J. Joachimsen, for the Amsterdam.

BROWN, J. The steamer Amsterdam having been lost by stranding, and proceedings being thereupon taken in this court by her owners to limit their liability upon payment into court of the appraised value of the vessel and her pending freight, an injunction was issued in accordance with the provisions of rule 54, restraining the prosecution of suits in the state courts. Several suitors, claiming damages for personal injuries arising more or less directly out of the stranding, have asked that the injunction be dissolved on the grounds that there is no statutory authority for the injunction itself; and, *secondly*, because claims for such personal damages are not within the statute. Rule 54 expressly declares that the owners, on complying with the statute, shall be entitled to an injunction order. It is not for this court to overrule the interpretation of the statute put upon it by the supreme court, or the practice they have sanctioned. This rule will not cut off sufficient opportunity to present every legal demand. The causes of action are purely maritime. This court, as a court of admiralty, is at least as appropriate as any other for the hearing of all questions arising in such cases; and every point that can be litigated anywhere can be presented and determined here.

The other question, as to whether personal injuries are within the provisions of the statute limiting liability, was carefully considered by BENEDICT, J., in the case of *The Epsilon*, 6 Ben. 381, and afterwards by CHOATE, J., in this court, in the case of the *Seawahnaka*, (*In re Long Island, etc., Transp. Co.* 5 FED. REP. 599, 624;) and in both cases it was held, upon full consideration, that such actions are within the provisions of the act. The reasons for the conclusions there given commend themselves to my judgment, and this application must, therefore, be denied.

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

PARSONS v. MARYE and others.¹

(Circuit Court, E. D. Virginia. February 11, 1885.)

1. FEDERAL JURISDICTION—SUITS AGAINST STATE OFFICERS—MANDATORY INJUNCTIONS.

Although a state, without its consent, cannot be sued as an individual, yet where a plain official duty, requiring no exercise of discretion, is to be performed by a state officer, and the performance is refused, any person who will sustain a personal injury by such refusal may have a *mandamus* to compel performance; or, where *mandamus* is not available, may have a mandatory injunction for that purpose; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.

2. SAME.—A federal court has jurisdiction over a state officer, in questions arising under the constitution, laws, etc., of the United States, where the law has imposed upon him a well-defined duty in regard to a specific matter not affecting the general powers or functions of government, but in the performance of which one or more individuals have a distinct interest, capable of enforcement by judicial process; and when it shall be necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree, or by injunction, compel the performance of the appropriate duty, or enjoin the officer from doing what is inconsistent with that duty and with the plaintiff's rights in the premises.

3. SAME—VIRGINIA COUPONS—CASE AT BAR.—A non-resident holder of Virginia coupon bonds makes arrangements with sundry tax-payers to purchase and use in payment of license taxes due the state the coupons cut by him from his bonds, by which arrangement he would receive payment in large part for his coupons; the tax-collecting officers, as required by state laws, have in various ways published that coupons would not be received in payment of such taxes; the state law allowing tax-payer to sue for purpose of verifying coupons had been repealed as to license taxes, and the writ of *mandamus* had been taken away from tax-payer in all coupon cases. The bondholder brought his bill in equity in the United States circuit court against the state auditor and the collecting officers of Richmond city to enjoin them from refusing to receive his coupons, and to have a specific performance of the state's contract to receive them, as evidenced on their face; the genuineness of the coupons was not denied in the answer, nor put in issue. *Held*: (1) The court has jurisdiction of the case and the parties, and may grant the relief prayed for. (2) A court of equity has power to award mandatory injunctions as part of its general jurisdiction. (3) A tender of the coupons was not necessary to entitle the complainant to bring his bill, the state having in numerous ways published that they would not be received. (4) Section 114 of the Virginia assessment act of March 15, 1884, by repealing section 3 of the act of January 14, 1882, took away the right to verify coupons when offered in payment of license taxes, which had been pronounced an adequate remedy in *Antoni v. Greenhow*, 7 Va. Law J. 218; S. C. 2 Sup. Ct. Rep. 91, and left the tax-payer without power to use coupons in paying license taxes, and without remedy against the state. (5) The genuineness of the coupons not being put in issue, must be taken as admitted by the defendant. (6) In making the contract of the tax-receivable coupon, the state virtually waived the benefit of plenary proceedings in suits against her officers to enforce it, in cases wherein the genuineness of the coupons is not put in issue; and it would seem that the state, in agreeing to receive the coupons, has waived the right to a plenary defense in all suits for specific performance of the contract in which she does not deny the genuineness of the coupon.

Motion for a Preliminary Injunction.

R. L. Maury and D. H. Chamberlayne, for complainant.

The Attorney General, for defendants.

¹From the Virginia Law Journal.

HUGHES, J. This bill is brought by Edward Parsons, a resident of New York, and a holder of the bonds of Virginia issued under the funding act of March 30, 1871. The defendants are Morton Marye, auditor of Virginia; Samuel C. Greenhow, treasurer; and R. B. Munford, revenue commissioner of Virginia in Richmond.

The bill sets out the history and provisions of the funding act of 1871, reciting that the bonds it authorized were issued, with coupons attached, receivable at and after maturity for all taxes, demands, and dues to the state, and that this receivability of the coupons for taxes constituted the chief value of the bonds. It alleges that a large number of creditors were induced to surrender their old bonds on the faith of the new, because of this receivability of the coupons in taxes, and that thereby a contract was made between the state and the holders of the new bonds; that the latter should have the right not only to tender the coupons directly in payment of taxes, but should also have the right to transfer them to any tax-payer of the state, with their quality of receivability for taxes annexed. The complainant sets forth that he is the owner of \$4,986 of said coupons past due and unpaid, cut by himself from genuine bonds issued under the funding act of 1871, and that they are genuine and receivable for taxes by their express tenor. He alleges that other coupons cut by himself from the same bonds have been pronounced genuine by a jury in the mode prescribed by the laws of Virginia, and have also been ascertained to be genuine by this court. He insists, therefore, that the coupons now in question are by every test genuine, valid, and legal, and entitled to be received, according to their tenor, in payment of all taxes due the state. These averments imply that this complainant has held as an investment of his own, for a series of years, the bonds from which the coupons in question were cut; that they have not been bought in market in speculation; and that he is now seeking to render these securities available by transferring them to tax-payers, to be used in payment of their dues to the state of Virginia. He alleges that this right to transfer them would make them worth to him 95 cents on the dollar.

The complainant alleges that Virginia has for a long time refused, and still refuses, to pay the coupons in money; and that she has, moreover, enacted certain laws intended to destroy their receivability in payment of dues to herself, to his own great damage and injury, and in violation of her contract with him in that respect. He particularly complains that the state has passed an act forbidding the receipt of his coupons for license taxes, and providing that the auditor and commissioners of revenue shall not grant licenses until the applicant exhibits evidence that he has deposited the amount of the license taxes in gold, silver, and treasury and national bank-notes; and he avers that he has the right to have his coupons received in payment of license taxes whenever they may be tendered by any person owing such taxes; and claims the right to such process as may

be necessary to require the officers charged with such duties to receive his coupons in payment of license taxes, and thereupon to issue licenses precisely as if payment had been made in money itself. He sets forth that, relying upon his right to transfer his coupons to those who are tax-payers of the state, he has made arrangements with sundry tax-payers to use the coupons in question in payment of their taxes and license taxes now due, and that by such arrangement he would receive payment in large part for his coupons; but that the tax collectors of the state refuse and the defendants refuse to accept the said coupons according to the terms of the contract. He files with his bill a list of the coupons, amounting to \$4,986, upon which it is founded, which identifies them by their numbers, letters, and dates. He prays for an injunction against the defendants to restrain them from refusing to receive the particular coupons thus identified. He also prays for a specific performance on defendants' part of the state's contract with himself, evidenced by these particular coupons, and for general relief.

The defendants file an answer, among other things setting up the acts of the general assembly of Virginia, which require coupons to be verified by a jury, and denying that these particular coupons have ever been so verified. The answer does not deny that the coupons are genuine, and does not comply in that respect with the statute law of Virginia, page 1094 of the Code of 1873, c. 167, § 39, which puts the burden of affirming the spuriousness of a signature on the defendant. Defendants also demur to the bill for multifariousness, and on other grounds, which are proper to be considered at the final hearing of this cause. Defendants also plead in abatement to the jurisdiction of the court. Upon the complainant's bill, duly verified, this court, on the second February instant, granted a temporary restraining order in substantial accordance with its prayers, and set down for hearing on the tenth of February the complainant's motion for a preliminary injunction. It is upon this motion for an injunction, which shall stand until the final hearing of the cause, that we are to pass.

After so many hearings of coupon cases in this court, it is useless to go into the equities of the one at bar. The contract of the state with the holders of coupons like those under consideration cannot be denied. The genuineness of the particular coupons, \$4,986 in nominal amount, as to which an injunction is asked for, is not denied, and must be assumed to be conceded. It is the misfortune of the defendants in all this class of suits that they cannot deny on oath the genuineness of the coupons sued upon; and that the court, upon all the rules of pleading, and by reason of section 39 of the 167th chapter of the Virginia Code, must take their genuineness as confessed. The supreme court of the United States declared in *Antoni v. Greenhow*, 7 Va. Law J. 218, S. C. 2 Sup. Ct. Rep. 91, that the legislation of Virginia relating to the verification of coupons in no manner shifts the burden of proof.

Nor is it worth while to advert to the provision of the national constitution which forbids a state from passing any laws violating or impairing the obligation of her contracts, or to show that such laws are unconstitutional, null, and void. Nor is it necessary to show particularly the unconstitutionality of legislative acts of Virginia which in their practical effect operate to destroy or impair the contract specifically set out in this bill. Nor need it be shown that the coupons now sued upon do evidence a contract between the state of Virginia and the complainant. That this is a valid, subsisting contract has, in reference to similar coupons, been declared by the supreme court of the United States in *Hartman v. Greenhow*, 102 U. S. 672, and by the supreme court of appeals of Virginia in *Antoni v. Wright*, 22 Grat. 833, and by both courts in other cases, which need not be cited. For the purposes of this case, all these propositions may be assumed to be finally and irrevocably settled; and I shall confine myself to questions which are in some degree peculiar to the present suit, and which may be thought open still to discussion. These are, *first*, whether the court has, as a federal court, jurisdiction of the suit itself; and, if so, *second*, whether, as a court of equity, it has jurisdiction of the remedy sought to be employed.

The first is only another form of the question whether we have jurisdiction as to the parties to the record. The complainant being a resident of New York, and the defendants residents of Virginia, we have jurisdiction as to the parties, unless the objection be valid that the parties defendant here are sued as officers of the state, and that the real defendant is the commonwealth of Virginia. If so, then we have no jurisdiction; for, although Virginia in the national constitution granted the right to be sued in the federal courts in certain cases by the subjects of foreign countries or citizens of sister states, yet by the eleventh amendment she revoked that grant. The question therefore is whether suits against the officers of a state, in respect to the discharge of their public duties, are, in all cases, suits against the states themselves; and, if not in all, then in what cases. When the suit of the *Baltimore & O. R. Co. v. Allen*, 17 Fed. Rep. 171, S. C. 7 Va. Law J. 409, was before the judges of this court, severally, in the spring of 1883, this very question was the pivotal one on which the case turned. On application by the company to me for a preliminary injunction to restrain the revenue officers of Virginia from distraining for taxes after tender of coupons, I refused the injunction, principally on the ground that the suit was, in fact, against the commonwealth, and only in form against her officers personally. The circuit judge, (Judge Bond,) a day or two afterwards, on application to him, granted the injunction, taking the opposite view, and holding that that was not a suit against the state. Not only was this, but other important questions connected with the obligations of the state and her officers to receive tax-receivable coupons involved. An appeal was taken, and we have been continually anxious that the supreme court should

decide that case, and give us the guidance of its rulings on the questions presented in it. But it has been allowed to await its turn on the overburdened docket of that court. The appellee (the railroad company) cannot move to advance it; and although section 949 of the United States Revised Statutes, in all cases "when a state is a party, or the execution of the revenue laws of a state is enjoined or stayed," authorizes the state herself to move to advance, and the state has been all the time entitled to a speedy hearing of this and other causes on the docket of the supreme court if she but demanded it, this important case was not advanced until lately, when it, with others in which she is a party, was set down for hearing on the sixteenth of March proximo. We have postponed our own action in many coupon cases now before us, awaiting decisions in those now in the supreme court. Our policy has been to refrain from all action which, with any color of propriety, can be postponed for that purpose.

I do not, however, think that the question of jurisdiction as to parties in the case at bar is any longer undecided in the supreme court. At the last term it decided the case of *Cunningham v. Macon & B. R. Co.*, reported in 109 U. S. 446, S. C. 3 Sup. Ct. Rep. 292, in which it elaborately discussed the question which confronts this court in the case at bar. The supreme court said, (3 Sup. Ct. Rep. 295-300:)

"The failure of several of the states of the Union to pay the debts which they have contracted, and to discharge other obligations of a contract character, when taken in connection with the acknowledged principle that no state can be sued in the ordinary courts as a defendant except by her own consent, has led, in recent times, to numerous efforts to compel the performance of their obligations by judicial proceedings to which the state is not a party. These suits have generally been instituted in the circuit courts of the United States, or have been removed into them from the state courts. In such suits the effort has been made, while acknowledging the incapacity of those courts to assume jurisdiction of a state as a party, to proceed in such a manner against the officers or agents of the state government, or against the property of the state in their hands, that relief can be had without making the state a party.

"It may not be amiss to try to deduce some general principles sufficient to decide the case before us. It may be conceded as a point of departure unquestioned that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in limited cases, etc. This principle is conceded in all the cases, and whenever it can be clearly seen that the state is an indispensable party to enable a court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the state not to be a necessary party, though some interest of hers may be more or less affected by the decision. A reference to a few cases may enlighten us in regard to that now under consideration.

"(1) It has been held in a class of cases where property of the state, or property in which the state has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in regard to the property. * * *

"(2) Another class of cases is where an individual is sued in tort for some act injurious to another, in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. * * * To this class belongs the recent case of *U. S. v. Lee*, 106 U. S. 196; S. C. 1 Sup. Ct. Rep. 240 (the *Arlington Case*;) for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense. * * *

"(3) A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter not affecting the general powers or functions of government, but in the performance of which one or more individuals have a distinct interest, capable of enforcement by judicial process. * * * In all such cases, from the nature of the remedy by *mandamus*, the duty to be performed must be merely ministerial, and must involve no element of discretion to be exercised by the officer. It has, however, been much insisted on that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree, or by injunction, compel the performance of the appropriate duty or enjoin the officer from doing that which is inconsistent with that duty, and with the plaintiff's rights in the premises. Perhaps the strongest assertion of this doctrine is found in the case of *Davis v. Gray*, 16 Wall. 203. In that case, the state of Texas having made a grant of the alternate sections of land along which a railroad should be located, and the railroad company, having surveyed the land at its own expense, and located its road through it, the commissioner of the state land-office and the governor of the state were, in violation of the rights of the company, selling and delivering patents for the sections to which the company had an undoubted vested right. The circuit court enjoined them from so doing, which was affirmed in this court. * * * It is clear that, in enjoining the governor of the state in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it; and that the principle should be extended no further. Nor was there in that case any affirmative relief granted by ordering the governor and land commissioner to perform any act towards perfecting the title of the company.

"The case of *Board of Liquidation v. McComb*, 92 U. S. 531, is to the same effect. The board of liquidation was charged by the statute of Louisiana with certain duties in regard to issuing new bonds of the state, in place of old ones, which might be surrendered for exchange by the holders of the latter. The amount of the new bonds was limited by a constitutional provision. McComb, the owner of some of the new bonds already issued, filed his bill to restrain the board from issuing that class of bonds in exchange for a class of indebtedness not included within the purview of the statute, on the ground that his own bonds would thereby be rendered less valuable. This court affirmed the decree of the circuit court, enjoining the board from exceeding its power in taking up by the new issue a class of state indebtedness not within the provisions of the law on the subject. In the opinion in that case the language of Mr. Justice BRADLEY tersely thus expresses the rule and its limitations: 'The objections to proceeding against state officers by *mandamus* or injunction are—*First*, that it is in effect proceeding against the state itself; and, *second*, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done. A state,

without its consent, cannot be sued as an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been settled that where a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain a personal injury by such refusal may have a *mandamus* to compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.' It is believed that this is as far as this court has gone in granting relief to this class of cases. * * *

"On the other hand, in the cases of *Louisiana v. Jumel* and *Elliott v. Wiltz*, 107 U. S. 711, S. C. 2 Sup. Ct. Rep. 128, very ably argued and very fully considered, the court declined to go any further. * * * The short statement of the reason for its judgment in those cases is that, as the state could not be sued or made a party to such proceeding, there was no jurisdiction in the circuit court either by *mandamus* at law, or by a decree in chancery, to take charge of the treasury of the state, and, seizing the hands of the auditor and treasurer, to make distribution of the funds found in the treasury in the manner which the court might think just. * * * We think the foregoing cases mark with reasonable precision the limit of the powers of the courts in cases affecting the rights of the state or federal governments in suits to which they are not voluntary parties.

"In actions at law of which *mandamus* is one, where an individual is sued * * * in regard to a duty which he is personally bound to perform, the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant, he must show it to the court and abide the result. In either case the state is not bound by the judgment of the court; and generally its rights remain unaffected. It is no answer for the defendant to say, 'I am an officer of the government and acted under its authority,' unless he shows the sufficiency of that authority. Courts of equity proceed upon different principles in regard to parties," etc.

After this careful review of the decisions, the court said that in the case before it Georgia was an indispensable party, and that as the object of the suit was to dispossess her of a railroad, of which she had both title and actual possession, the suit was not one of which it could retain jurisdiction.

The reasoning of the supreme court in this case of *Cunningham v. Railroad Co.*, really *Cunningham v. Georgia*, (for the state herself was the railroad company,) settles in advance the case pending before it from *Virginia of Allen v. Baltimore & O. R. Co.*, and makes it reasonably certain that, at least on the question of jurisdiction as to parties, it will affirm the ruling of Judge Bond and reverse my own. It settles also the case at bar; for the granting of a preliminary injunction here is by no means as extreme an exercise of jurisdictional power as there was in the *Texas Case*, where a federal court arrested the hand of a governor and land commissioner while engaged in violating a legislative contract; or as there was in the *Louisiana and McComb Cases*, where another federal court, in order to prevent an indirect and contingent depreciation of complainant's bonds, forbade the state's financial board from issuing bonds which they deemed, but which the court denied, that they had a right to issue; or as there

was in the *Arlington Case*, where this court, in which I now sit, gave judgment against officers of the army of the United States holding for the United States,—one of them in charge of a cemetery for Union soldiers,—ordering them off the patrimony of the Lees, and requiring possession to be given to a general of the confederacy. Compared with those cases, the one at bar, involving as it does less than \$5,000 in nominal value of dishonored coupons, is not of superior importance. I think from what itself has said that there can be no reasonable doubt entertained as to what the supreme court's views are on the subject of suits against officers of states. That congress is of opinion that the revenue officers of the states may be "enjoined and stayed" in their collections, is shown by the terms of section 949 of the United States Revised Statutes, from which I have quoted. I shall, therefore, leave that branch of the subject.

The question stated, in syllabus form, is this: A public creditor who does not ask that money may be taken out of the treasury, or property out of the possession of the state, has a right under a public statute to the performance in his behalf of an act by a public officer. That officer sets up another public statute which forbids the performance of that act, but which the public creditor insists is unconstitutional, null, and void. This question is brought before a court for decision by the public creditor, who makes the officer alone a party defendant to his suit. The question is whether the officer must obey the statute which commands or the statute which forbids the act sought by the creditor. It is a question for judicial decision; and as the act sought is merely ministerial, the weight of judicial authority is that the state is not a party necessary to the suit. Such is the case at bar. By setting out on the face of the coupons a contract to receive them in discharge of taxes it would seem to have been the intention of the Virginia legislature of 1871, in the event that this contract should be impaired by subsequent legislation, to give the federal courts jurisdiction to enforce it. And by making the coupons self-collecting in taxes it would seem to have been the object of the same legislature to make the reception of the coupons for taxes a mere ministerial duty of the revenue officers of Virginia, the performance of which might be enforced by the courts in proceedings against the officers, to which the state would not be a necessary party. If the coupons evidenced simply an obligation of the state to pay money, then it would be out of the power of the courts, in proceedings against revenue officers alone, to take money out of the public treasury for the purpose of paying the coupons. This difference between a coupon calling for money and a coupon receivable in the payment of taxes affords a good illustration of the difference between a suit against a public officer, in which the state is a necessary party defendant, and a suit in which the officer only needs to be sued. The case at bar is one of the latter class.

I come now to the question whether this court, having jurisdiction

as to parties, has, as a court of equity, jurisdiction of the remedy, and may grant the injunction prayed for by the complainant. Assuming, from the condition of the pleadings, that the coupons described in the bill are genuine, and that complainant has transferred them to tax-payers with the quality of receivability guaranteed, the remaining question is simply one of the jurisdiction of equity as to the remedy applied for; and let it be premised that an actual tender of the coupons described in the bill to the revenue officers of the state, and their refusal to receive them, were not necessary conditions precedent to entitle complainant to bring this bill,—it having been publicly made known by the authorities of the state, in numerous ways, that the coupons would not be received in payment of taxes according to their tenor, these public notifications made a tender useless, the law not requiring any one to do a vain thing. *Tacey v. Irwin*, 18 Wall. 549.

If the writ of *mandamus* is, on general principles, the proper one in this case, it must be observed that it is taken away from the complainant by the act of assembly of January 26, 1882, and by the acts of 1884 relating to licenses. *Mandamus* being a remedy at law, and the 914th section of the United States Revised Statutes having conformed the practice in the courts of the United States in common-law cases to that employed in the courts of the states in which they are respectively held, the statutes of Virginia, which take away *mandamus* in the state courts in cases where coupons are sought to be used in the payment of taxes, take it away in the courts of the United States. *Harvey v. Virginia*, 8 Va. Law J. 400; S. C. 20 FED. REP. 411. In that case I also held that the right of a tax-payer to sue for the purpose of verifying coupons offered in payment of taxes, which was given by section 3 of the act of January 14, 1882, (Coupon Killer No. 1,) was taken away as to license taxes by section 114 of the act assessing licenses and providing a mode of applying for licenses, approved March 15, 1884, which repealed that section. And therefore complainant, having no remedy at law, and being otherwise remediless, resorts to equity, and applies here for what is known in English and American jurisprudence as a *mandatory* injunction, which is the counterpart in equity of a *mandamus* at law.

Must we go into the elementary books to find warrant for such a process? Jeremy, in his *Equity Jurisdiction*, says: "An injunction is a writ framed *according to the circumstances of the case*, commanding an act which the court regards as essential to justice, or *restraining* an act which it considers contrary to equity and good conscience."

The mandatory injunction may be in the direct form of command, or in the direct form of prohibiting the refusal to do an act to which another has a right. It may be used against public officers. High says, in section 1308: "The preventive jurisdiction of equity extends to the acts of public officers, and will be exercised in behalf of private citizens who sustain such injury at the hands of those claiming to

act for the public as is not susceptible of reparation in the ordinary course of proceeding at law." Indeed, section 949 of the United States Revised Statutes shows that the federal courts may enjoin and stay the revenue officers of the states. Such was the express ruling of the supreme court, as already quoted, in the case of *Board of Liquidation v. McComb*.

It were useless to cumber this opinion with as profuse a citation of authorities as might be made in support of injunctions, mandatory in character, forbidding public officers or other defendants to refuse the performance of duties which citizens may rightfully demand at their hands. Very many authorities for such process are cited in the brief of counsel for complainant, embracing cases from the English courts, from the courts of the states of this Union, and from our federal courts, and I need not repeat the citations here. The printed brief does not contain the case of *Brooke v. Barton*, 6 Munf. 306, in which the Virginia court of appeals enjoined the defendant to permit the complainant to have the benefit of a covenant entered into by the defendant. I will add a few citations from decisions of the federal courts. In the case of *Coe v. Louisville & N. R. Co.* 3 FED. REP. 775, Judge BAXTER, United States circuit judge, issued an order enjoining defendant from refusing to comply with an obligation arising upon a contract. In the case of *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 FED. REP. 650, Judge HALLETT, (Circuit Judge McCrary concurring,) after elaborate argument and an extended citation of precedents, made a decree of the same character. In the case of *Baltimore & O. R. Co. v. Adams Exp. Co.* 22 FED. REP. 404, a like injunction forbidding the refusal of a duty enjoined by contract was granted, Judges BOND and MORRIS sitting. These and other like orders of federal courts in other cases had been pointedly sanctioned by what the supreme court had said in the case of *Board of Liquidation v. McComb*.

In the light of all the authorities on the subject, we do not think there is any doubt of the power of a court of equity, as a part of its general jurisdiction, to grant injunctions mandatory in character.

The real objection to the remedy in the present suit, though not made in the defense nor argued at bar, as we should have desired, is that in this case the preliminary injunction is equivalent to a final decree, and that the defendants are therefore deprived of the benefit of plenary proceedings, which, in general, is a matter of right. But this results from the character and subject of the contract, the benefit of which is sought by this suit. In making the contract of the tax-receivable coupon, the state virtually waived the benefit of plenary proceedings in suits against her officers to enforce it in cases wherein the genuineness of the coupons is not put in issue. This contract would be worthless to the tax-payer, if he could not use the coupon at the time the tax was due; and if the right to use it is denied him just when the collector applies for the tax under the laws of the

state, its value for that purpose is destroyed, or, by the use of it being postponed, is seriously impaired. In agreeing that it shall be so used, it seems to us that the state has waived her right to a plenary defense in all suits for a specific performance of the contract in which she does not deny the genuineness of the coupon. I repeat that we should have liked to hear argument on the subject. It was, in point of fact, the real question in the case. In the absence of argument, we thought that the objection under consideration did not hold good in this suit.

The decree now entered will apply of course only to the coupons which are the subject of this bill, \$4,986 in nominal amount. I believe that Judge BOND has given a restraining order in the similar suit of George Parsons. The aggregate amount of coupons involved in both is less than \$10,000 in nominal value, and these two suits do not, therefore, embody in themselves amounts of any grave importance. But we are well aware of the sweeping importance to the state of the principle on which the case at bar proceeds, and earnestly desire that the question shall be carried to the supreme court, to be dealt with there. We have no right to suppose that the complainant here made the amount on which he brought his suit less than \$5,000 by design. *Non constat* but that these coupons are all that he owned. But we are not disposed to encourage suits brought on amounts just within \$5,000, working as they do a practical fraud upon the right of defendants to the judgment of the appellate court, and shall be averse to granting injunctions in future cases having that effect until a suit involving more than \$5,000 shall have been brought.

Injunction awarded.

BOND, J., concurs.

See note to *Baltimore & O. R. Co. v. Allen*, 17 FED. REP. 188.—[ED.]

FRANK and others v. DENVER & R. G. RY. Co. and others.

(Circuit Court, D. Colorado. February 12, 1885.)

1. RAILROAD MORTGAGE—LEASE—ROLLING STOCK.

A contract, whereby cars and locomotives are leased to a railroad company, that agrees to pay for every car and locomotive so delivered an annual rent, equivalent to one-sixth of the original cost thereof, for the period of ten years, at the end of which the cars and locomotives are to become the property of the railroad company, with a proviso that upon default in payment of the annual rent, or failure to observe any of the covenants of the lease, the rights of the railroad company shall be determined, and the property reclaimed by the lessors, is a mortgage, and not a lease.

2. SAME—FAILURE TO COMPLY WITH STATE LAW—GEN. LAWS COLO. 1877, P. 124 —LIEN—RIGHTS OF CREDITORS.

Where such an instrument is not acknowledged and recorded as required by the law of the state where the rolling stock is situated, it will not establish a

lien on such property in favor of the mortgagee as against creditors of the railroad company proceeding by attachment and execution, or purchasers from the railway company in good faith.

3. **SAME—LIENS—INTEREST ACQUIRED BY MORTGAGEE.**

Mortgagees of property to be acquired by the mortgagor, take only the interest of the mortgagor therein, and if the property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time.

4. **SAME—SELLER RETAINING LIEN.**

This rule applies to the seller of property who retains a lien on the property sold, or the title thereto, as security for the purchase money.

5. **SAME—RECEIVER—PAYMENT OF CLAIMS—ORDER MODIFIED.**

Order directing receiver to pay principal and interest falling due under the contract, under which rolling stock was furnished to the railroad company, modified so as to postpone payment of principal until other claims are paid.

Upon Motion to Vacate or Modify the Order directing the receiver to pay car trusts.

L. S. Dixon, for plaintiffs.

Hugh Butler, L. K. Bass, and C. J. Hughes, for defendants.

E. O. Wolcott, for receiver.

HALLETT, J. June 6, 1878, the Philadelphia Trust, Safe Deposit & Insurance Company entered into contract with the Denver & Rio Grande Railway Company "to lease to and place upon the railroad" of the latter company certain cars and locomotives which should be delivered to the first-named company for that purpose by the Philadelphia & Colorado Equipment Trust. Defendant company was to pay "for every car and locomotive an annual rent equivalent to the one-sixth of the original cost thereof," and the lease to continue for 10 years, when the cars and locomotives would become the property of the railway company. By this method of computation, it is said that upon completing the contract the railway company would pay the cost of the rolling stock, and 8 per cent. interest on deferred payments. Under this agreement cars and locomotives of the value of \$345,500 were delivered to the railway company, of which \$217,000 has been paid, and interest and cost of trust amounting to \$123,-396.20.

Other contracts of similar character, to the number of five, were afterwards made by the railway company with the Rio Grande Extension Company by which the railway company obtained rolling stock of the value of \$4,970,000. These agreements were assigned to the Guarantee Trust & Safe Deposit Company, of Philadelphia, a defendant in the bill and the present holder. In all these instruments it was provided that, upon default in payment of the annual rent, or failure to observe any covenant of the lease, the right of the railway company in the rolling stock would be determined, and the property might be reclaimed by the lessor. The same result would follow "any proceedings of law or in equity, or otherwise, in which the said party of the second part may be a party, whereby any of the rights, duties, and obligations of the party of the second part under this contract shall or may be transferred, abridged, or in any manner whatever al-

tered or impaired, or its control and custody of the leases, cars, and locomotives be in anywise interfered with; and any termination of this lease under this covenant shall have the same effect as if the party of the first part or its assigns had repossessed themselves of the said cars and locomotives, as hereinbefore provided."

These instruments, in the form of leases, and having somewhat of the aspect of conditional sales, were a disguise of the real transaction between the parties. The rolling stock was not, at any time, owned or held by the parties assuming to lease the same, or by any one represented by such parties. Under the first contract of June 6, 1878, the Philadelphia & Colorado Equipment Trust, an association of shareholders, to the amount of \$500 each, furnished money, with which the railway company either bought or constructed cars and locomotives for its own use. In like manner, under the other contracts with the Rio Grande Extension Company, the railway company bought or constructed rolling stock for its own use with money furnished by shareholders through the Guarantee Trust & Safe Deposit Company, to be returned, with interest, from the payments made under the contracts by the railway company. Thus it appears that the payees of these instruments cannot stand in the character assumed by them, of lessors of the rolling stock, and, in so far as they may have any position in the law, they are to be regarded as mortgagees of the property. This assumption of a false character by the payees, with much verbiage of the law in the several contracts, will not, however, affect the result, if the equities of the transaction shall appear to be with them, of which more will be said further on.

In July last, when the original bill was filed, and the receiver was appointed, plaintiffs had not discovered any defect in the contracts, and were disposed to recognize them as valid and binding, and requiring fulfillment on the part of the railway company, in order to retain the interest already acquired through and by means of the large payments previously made under the contracts by the railway company. Accordingly, they asked that the receiver appointed in the cause be directed to pay the sums falling due under the contracts for principal and interest; and this was done. The receiver has since paid, from the current earnings of the road, all such sums; and the plaintiffs, having amended their bill, now move to vacate or modify the order in that respect, on the ground that the rolling stock is subject to the consolidated mortgage which they seek to foreclose, and the said several contracts are invalid as against them. The consolidated mortgage, under which plaintiffs claim, bears date January 1, 1880, and covers "the rolling stock and equipment, of whatever nature and kind, owned, or hereafter to be acquired and owned, and as acquired by the said company, subject to a first mortgage of the company, of date April 13, 1871. The first of the contracts, relating to rolling stock, was prior to the consolidated mortgage, but, as the property thereby acquired is subject to the first mortgage of the road,

and the lien of that mortgage was complete before the consolidated mortgage was executed, it will not be necessary to consider the relation of the latter mortgage to that property. In any view of the question presented, the plaintiffs cannot resort to the rolling stock acquired under the first contract until the first mortgage shall be satisfied, a contingency which does not call for discussion at this time. The other contracts were subsequent in date to the consolidated mortgage, and the property therein mentioned falls within the designation, in that mortgage, of after-acquired property. The provisions of the statute of this state, relating to chattel mortgages, (Gen. Laws 1877, p. 122,) were not observed in form and substance, in the manner of acknowledging or recording these instruments, and therefore they do not establish a lien on the property in favor of the defendants, as against creditors of the railway company proceeding by attachment and execution, or purchasers from the railway company in good faith. *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *George v. Tufts*, 5 Colo. 162.

And this is the pith and substance of plaintiffs' argument: that these rolling-stock contracts, being invalid as to creditors of the railway company, and purchasers from the railway company without notice, are also invalid as to them. But the rule is that mortgagees of property to be acquired by the mortgagor take only the interest of the mortgagor therein. As declared in *U. S. v. New Orleans R. R.* 12 Wall. 365, "a mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment or recognizance, can displace such mortgage for purchase money." *Fosdick v. Schall*, 99 U. S. 235.

This is certainly the rule established by these cases, in favor of the seller of property, who may retain a lien on the property sold, or the title thereto, as security for the purchase money; and the holders of these contracts would seem to be equitably entitled to the benefit of it. Having furnished money with which the railway company purchased rolling stock under an agreement for a lien on the property as security for repayment, they may stand in the place of the seller, and have advantage of all remedies to which he would be entitled in the same situation. In another view, and independently of any special contract establishing a lien on the property sold to the railway company, demands of this kind are debts of the income, to be paid from current revenues of the road in preference to bondholders

and other secured creditors. *Hale v. Frost*, 99 U. S. 389; *Burnham v. Bowen*, 111 U. S. 776; S. C. 4 Sup. Ct. Rep. 675.

If the road had not been supplied with rolling stock when the receiver took possession, it would have been necessary to purchase enough to carry on the business of the road, and the receiver would have paid for it from current earnings available for that purpose. That he now pays for the rolling stock under contracts made by the railway company previous to his appointment, does not present the question in any other light. He is buying rolling stock for the use of the road, and which is said to be necessary to carry on its business, according to the usual course of proceeding in cases of this kind. In order to keep the road in operation, the receiver must have rolling stock, and he ought not to take it in behalf of bondholders or any one, without paying for it. Every payment made under these contracts increases the interest of the railway company in the rolling stock, and adds to the value of plaintiffs' mortgage security. Payments are made in the interest of bondholders as well as the railway company, and I see no grounds for the complaint for them, unless it may be that the price of the cars is too high, or that some of them are not necessary to the business of the road. If anything is to be gained by rescinding any of the contracts and surrendering the cars to the payees, action may be had on proper showing, but the court is not now advised in respect to that matter. In some cases, where rolling stock was held under contracts of purchase, the receiver has paid for the use of it and returned it to the seller at the close of the receivership. *Fosdick v. Schall*, 99 U. S. 235; *Myer v. Car Co.* 102 U. S. 1.

That course was probably regarded as promoting the best interests of all concerned. Whenever considerable payments have been made under the contracts, and the interest of the railway company in the rolling stock acquired by such payments appears to be large, the advantage of continuing the payments under the receivership will be apparent. In that way the use of the property, during the receivership, will be secured, and the interest acquired by prior payments may become available to the company or to purchasers on foreclosure. My conclusion is, therefore, that, until some further showing shall be made in these matters, payments under these contracts ought to be continued by the receiver in the interest of all parties concerned. There is, however, some reason to believe that these rolling-stock creditors have, at present, under the order heretofore entered, an extraordinary preference over other claims of the same class, to which they are not entitled. While as to the bondholders of the railway company, secured by general mortgage of the road and its property, they stand with the labor and supply creditors, and are entitled to payment from the current income of the road, I perceive no reason for saying that they are above all other creditors of the class to which they belong. The circumstance that they exacted of the railway company a stipulation to deliver the property to them in case of non-

payment will hardly accomplish that result. Creditors of an insolvent estate in the hands of a receiver are entitled to payment in the order and precedence established by the merits of their claims, and not by legal remedies, for which they may have contracted, or which may be given them by law. It is disclosed that payments made by the receiver under these contracts have so absorbed the earnings of the road that the orders of the court relating to labor and supply demands remain in large part unexecuted. While, as before stated, these rolling-stock people, in a general way, and with reference to the general mortgages of the road, are classed with the labor and supply creditors, the latter are more immediately and directly creditors of the income. They wrought and gave of their substance under promises of prompt payment from the railway company, and the rolling-stock people are, as to them, general mortgagees of a part of the company's property,—long-time creditors, reaping interest as the others may sow for them.

The labor and supply creditors, who are entitled to payment under existing orders in any just consideration of their position, seem to be on an equal footing if not in advance of the rolling-stock contracts, and they have been postponed for the benefit of the latter for more than seven months. They are now entitled to payment of their demands. The large amount of taxes falling due at this season of the year adds to the financial difficulties of the situation. As the rolling-stock people have hitherto received their dues promptly, while others, equally entitled to payment, have been compelled to wait, it seems reasonable to suspend payment of principal sums falling due under their contracts until other demands on the receiver have been satisfied. With the payment of interest as it matures, which, it is believed, can be made without serious embarrassment, no injustice will be done to these creditors, and the receiver will have funds to relieve other creditors of the company, and to pay taxes. The order directing payment of amounts coming due for rolling stock will be modified, as indicated, so as to postpone the payment of principal sums until other demands, recognized in existing orders, shall be paid.

WILSON v. NEAL and another, County Com'rs, etc.¹

(Circuit Court, S. D. Ohio, W. D. January 19, 1885.)

1. COUNTY BONDS—COUPONS—DEMAND OF PAYMENT—NO FUNDS.

That there were no funds in the county treasury available for their payment, is a sufficient excuse for not presenting and demanding payment of coupons payable "on presentation."

2. SAME—ULTRA VIRES—RATE OF INTEREST—PAYABLE SEMI-ANNUALLY.

County commissioners were authorized to issue bonds "bearing interest at six per centum per annum." *Held*, that bonds bearing that rate, payable semi-annually, are within the authority vested in the commissioners.

3. SAME—CONSTRUCTION OF STATE STATUTES—DECISIONS OF STATE COURTS.

In construing statutes of a state the United States courts follow the decisions of the courts of that state.

4. SAME—OHIO—COUNTY AUDITOR SHOULD ISSUE WARRANTS FOR PAYMENT OF BONDS.

Under the statutes of Ohio it is not necessary that the holders of county bonds should apply to the county auditor to issue his warrant upon the treasurer for the payment of either principal or interest. It is the auditor's duty to issue the proper warrants and deliver them to the treasurer without request of the bondholders.

5. SAME—INTEREST ON INTEREST.

Holders of county bonds, issued under the laws of Ohio, which stipulated for the payment of interest semi-annually, part only of the bonds having coupons therefor attached, and the semi-annual installments of interest not being paid when due, are entitled to recover interest upon all such semi-annual installments from the date they became due.

At Law.

Thomas & Thomas, for plaintiff.

White, McKnight & White, for defendant.

SAGE, J. The plaintiff sues to recover the principal and interest of certain bonds bearing interest at 6 per centum per annum, payable semi-annually, issued in the year 1870 by the county of Brown, to pay the cost of improving a county road. The plaintiff also claims interest upon the unpaid installments of interest from their maturity.

The first defense admits the issuing of the bonds to the contractor who constructed and completed the road, and their transfer to the plaintiff, and that the plaintiff is entitled to recover the amount of the bonds, with interest at the rate of 6 per centum per annum. Defendants say that they have always been ready and willing to pay the plaintiff the amount so admitted to be due, upon presentation of the bonds and coupons, and the delivery of them for cancellation, which the plaintiff has always refused to do without receipt of interest upon the several installments from their maturity. Defendants further answer that they had no power to contract for a greater rate of interest than 6 per cent. per annum.

The second defense sets up the litigation whereby the assessments for the improvements of said road and their payment were enjoined

¹ Reported by Harper & Blakemore, Esqs., of the Cincinnati bar.

until 1877, and the defendants prevented from raising the money to pay said bonds or any part of the interest thereon, or from paying the same or any part thereof. The defendants aver that, as soon as the injunction was dissolved, they proceeded to collect the assessments and apply them to the payment of outstanding bonds and interest, but that the plaintiff never in person, or by agent or attorney, presented his bonds to the auditor of the county for redemption and cancellation, or demanded from the auditor his warrant upon the treasurer for the payment of the same. The defendants also allege that since 1878 there have been at all times funds in the treasury of said county ample for the payment of said bonds, and 6 per cent. per annum interest thereon.

The third and last defense is that said coupons were never presented to the auditor, and warrants obtained from him for their payment by the treasurer. Defendants admit that about the twenty-seventh of May, 1881, said bonds and coupons were presented to the treasurer of Brown county by the plaintiff, and payment demanded, with a demand also for interest on the coupons, which was refused, but the treasurer offered to pay the bonds, with simple interest, on the surrender of the bonds and coupons, which was declined.

The plaintiff replies that it was understood by and between the county commissioners and the parties to whom the bonds were delivered, and at the time of their delivery, that the same should be paid by the treasurer of the county directly, without the warrant of the auditor, in accordance with the uniform custom in said county, and that in accordance with said custom the auditor at all times refused to issue warrants in such cases. He also denies the allegation of the answer that the treasurer, in May, 1881, offered to pay principal and simple interest, and avers that at that time the treasurer informed him that he had no funds wherewith to make payment, and denies that there ever was money in the treasury to pay the plaintiff's demands. These are all the allegations of the reply necessary for the purposes of this decision.

The improvement of the road was ordered, and an assessment made by the county commissioners, in the year 1866, upon a petition under the act of April 5, 1866. 63 Ohio Laws, 114. The act authorizes the commissioners to issue the bonds of the county for the payment of the expense of the improvement, payable in installments, or at intervals, not extending in all beyond the period of five years, and bearing interest at 6 per centum per annum, and directs that the assessment shall be divided in such manner as to meet the payment of principal and interest of the bonds. This act was repealed twenty-ninth March, 1867, (64 Ohio Laws, 80,) and a new act substituted; but it was provided that the repeal should not affect or impair any right acquired or liability incurred under the repealed act. The county commissioners were authorized by the act of 1867 to issue bonds, payable in installments, or at intervals, not exceeding in all five years,

bearing interest at a rate not exceeding 7 per centum per annum, payable semi-annually. On the fifteenth March, 1869, (66 Ohio Laws, 24,) the section of the act of 1867 authorizing the issuing of bonds was amended, but not in any particular material to this case. The saving clause of the act of 1867 prevented that act, and the repeal of the act of 1866, from affecting the proceedings, including the assessment, for the improvement of the road to pay the cost of which the bonds sued upon were issued, and, in the opinion of this court, reserved to the commissioners the right to issue bonds in payment of the expense of said improvement, as provided in the act of 1866. The act of 1867 was not amendatory; it was new legislation relating to the same subject-matter as the act of 1866, which it repealed. The general reservation of all right acquired and liabilities incurred, included the right vested in the county commissioners to issue bonds to pay the expense of the improvement which had been ordered, and the assessment made before the passage of the act of 1867. But if the bonds depend for their validity upon the act of 1867, or the amendment of 1869, the result in this case would not be affected, as we shall presently see. The validity of the bonds must be sustained upon that act and amendment, if not upon the act of 1866; for it cannot be concluded that the legislature intended, notwithstanding the reservation in the act in 1867 in favor of rights accrued and liabilities incurred, to nullify that reservation by taking away from the commissioners the right to issue bonds for any improvement ordered, and for which an assessment had been made under the act of 1866.

The bonds in this case were issued in 1870. No payments of principal or interest have been made. They are payable 48 months after date, with interest at 6 per cent. per annum, payable semi-annually. Some of the bonds have interest coupons, and the interest is made payable "on presentation of proper coupon." Others are without coupons, and provide upon their face for the semi-annual payment of interest.

The validity of the proceedings, of the order for the improvement, and of the assessment under which the bonds sued upon were issued, was contested, and during the litigations, which continued until late in the year 1877, no assessments were collected. The first payment into the county treasury on account of assessments was in February, 1878, and until then there were no funds available for the payment of principal or interest of bonds. Neither bonds nor coupons were in the mean time presented for payment. On the twenty-seventh of May, 1881, the plaintiff, by his attorney, presented his bonds and coupons and demanded payment, with interest upon the coupons from the date of their maturity. At the maturity of the coupons, and of the bonds, there were no funds in the county treasury for their payment. That was sufficient excuse for the failure to present them and demand payment. The stipulation for the payment of the interest on presentation of the proper coupon imported on the part of the commissioners

that the county would have the money in the treasury ready for payment when the interest became due. It is necessary to plead and prove affirmatively that fact to make non-presentment and the failure to demand payment available as a defense. Jones, R. R. Secur. § 334, and cases cited. The defense that there was no presentment or demand of payment is, therefore, not well taken.

It is insisted, however, that the commissioners exceeded their authority in stipulating for the semi-annual payment of interest, for the reason that the law limited their authority to the issue of bonds "bearing interest at 6 per centum per annum." It is urged that the contract to pay interest semi-annually was *ultra vires* and void, and that, therefore, only 6 per centum per annum, payable annually, is recoverable. There is no doubt that the commissioners were limited by the authority conferred by the statute. But the statute fixes only the rate of interest; it is silent as to the times of payment. The bonds bear but 6 per centum per annum interest, and that it is made payable 3 per centum in 6 months and 3 per centum in 12 months does not increase the yearly rate. The proposition that the stipulation to pay the lawful rate in semi-annual installments is usurious, is not sound; for the legal presumption is that parties to a contract intend performance according to its terms, and all that was necessary to avoid the payment of interest upon the coupons was prompt payment upon their maturity. *Monnett v. Sturges*, 25 Ohio St. 384, and *Cook v. Courtright*, 40 Ohio St. 248, are conclusive upon this point. In construing the statutes of a state, the United States courts adopt and follow the decisions of the courts of the state.

There is another consideration which, in view of the reasoning of the court in *Cook v. Courtright*, cited above, sheds light upon this branch of the case. The county commissioners were authorized to issue the bonds of the county, payable in installments, or at intervals, not extending in all beyond the period of five years. They could, if they saw fit, make them payable, some in one month, some in three months, some in six months, and others at any other intervals within five years,—all bearing interest at 6 per centum per annum,—and thus provide for the payment of interest monthly or quarterly or semi-annually, and no objection could be successfully urged to their validity for that reason. How can there be any difference, in principle, between that mode of proceeding, and aggregating the sums of the short bonds in one long bond, and making the interest on that bond payable quarterly or semi-annually, or even monthly? It is true that the bondholder might immediately, on payment, loan the interest paid him at a percentage, but who ever heard that that fact would taint the original transaction with usury?

Was it necessary to present the bonds and coupons to the auditor, and obtain his warrant upon the county treasurer? The law in force when these bonds matured, relating to the redemption and cancellation of the securities for the funded debt of counties in this state, is

the act of February 28, 1859. 56 Ohio Laws, 28. It makes it the duty of the county auditor to draw at the proper time his warrant upon the treasurer for the payment of such installments of principal and interest as may be then due, and to deliver the same to the treasurer, and the duty of the treasurer to thereupon make payment. The law now in force (Rev. St. Ohio, § 1063) contains the same provision in effect. It is nowhere made the duty of the holder of the securities to apply to the auditor for a warrant. That is between the auditor and the treasurer, and the bondholder has nothing whatever to do with it, and is not responsible for the default of the auditor in that behalf. He has no right to demand or to receive the warrant. The auditor has no right to deliver it to any one but the treasurer. Moreover, by section 2 of the act of 1859, it was provided that if "from any cause" (and that includes the failure of the auditor to make out and deliver to the treasurer the proper warrant) the debt or installments of interest be not paid at the time and place of maturity thereof, it should be the duty of the treasurer at any time afterwards to pay the same as funds in his hands applicable to that use might admit; but if the treasurer was ready with funds to make payment at maturity, and the holder of the security did not have the same then and there present and in readiness to be surrendered, or to have payment indorsed thereon, as provided by the law, the county should not thereafter be bound to pay interest thereon until payment should have been afterwards demanded and refused at the office of the county treasurer. This provision was carried into the Revised Statutes, and is yet the law of the state. Rev. St. Ohio, § 1064.

What are the facts of this case? It is stipulated as an agreed fact that the auditor never drew any warrant for the payment of principal or interest of any of the bonds sued upon, or of any others of the same class, and that it has been the uniform custom in Brown county, ever since the passage of the law of 1867 authorizing the improvement of county roads by assessment, for the treasurer to pay the bonds and coupons issued for such improvement without such warrant upon presentation to him of the bonds or coupons, provided there was money in the treasury applicable to the payment of the same. It is enough to say of this custom that it is not worth the slightest consideration. It was at all times the auditor's duty to look to the statute. There was no such money in the treasury until February 28, 1878, when there was paid upon assessments the sum of \$2,426.95. In August, 1878, were paid \$359.54, and subsequently there were payments from year to year until in February, 1884, the last payment, of \$4,016.05, was made, the total being \$61,097.98, and the total amount of the principal of the bonds issued and outstanding, \$56,000. It is proven, moreover, that the treasurer always refused to pay interest on the coupons and upon the overdue installments of interest. Simple interest at 6 per centum per annum, or 6 per cent. "straight," as he expresses it, was all he would pay. It is beyond question that the

failure of the auditor to draw the proper warrants and deliver them to the treasurer is no defense to the plaintiff's claim. Is he, then, entitled to interest upon his coupons, and upon the overdue installments of interest upon the bonds issued without coupons? The law of Ohio provides for the payment of interest upon every debt due and unpaid, without any stipulation to that effect in the contract or obligation out of which the debt arose. The cases of *Monnett v. Sturges* and *Cook v. Courtright*, cited above, establish that the law applies to overdue installments of interest as fully as to the principal. But the proposition is so plain as to need no authority to support it. The law was in force when the bonds in suit were issued, and it entered into and was part of the obligation of the bonds, and it is the duty of this court to enforce it. The plaintiff is entitled to the interest upon his coupons and overdue installments of interest which he demands, and judgment will be entered accordingly.

The objection to the jurisdiction of this court has been heretofore disposed of, and need not be further considered. It is not well taken.

UNITED STATES *v.* SHRIVER.

(District Court, S. D. Illinois. 1885.)

INTERNAL REVENUE—RETAIL LIQUOR DEALER'S LICENSE.

A party having paid special tax as retail liquor dealer at a particular town, who fills orders received by mail to ship liquors in retail quantities to another town, there to be delivered to the party so ordering upon payment of the price of the liquor, together with the express charges, is liable to the payment of special tax as retail liquor dealer at the place where such delivery is made.

Indictment for carrying on business of retail liquor dealer at Fairfield, Illinois, without payment of special tax.

James A. Connolly, Dist. Atty., for prosecution.

Bluford Wilson and *J. Bowman*, for defense.

TREAT, J. The defendant is indicted for carrying on the business of a retail liquor dealer at Fairfield, Illinois, without having paid the special tax required by the laws of the United States. It appears that his residence and regular place of business were at Shawneetown, Illinois, where he carried on business as wholesale and retail liquor dealer, having paid his special tax as such; and so far as his business was carried on there, it appears to have been in strict accordance with the law. But it appears that he went to Fairfield, Illinois, to solicit trade, taking with him samples of his liquors which he exhibited to different persons there; took some orders, and while there made a contract with the agent of the express company at that place, whereby the agent was to act as his agent for receiving and distribut-

ing such liquors as he might ship there, and collect his bills for him, for which he was to pay the express agent 10 per cent. on all money so collected by him. He arranged with this Fairfield agent that parties ordering liquors from him at Shawneetown, who desired to save the return express charges, should have their liquor sent to them by express, in jugs, with no charges on the way-bill to be collected by the express company, except the mere charge for carrying, and in such cases the jugs were to have a shipping-tag attached to them, on which would appear the name of the consignee and the value of the liquor. All such jugs the Fairfield agent was to hold until the persons named on the tags called for them, when, upon paying the amount named on the tags and the express charges, the agent should deliver the jugs to such persons, or to any others who should come with orders from the persons named on the tags.

In other cases where the order directed the shipment to be made by express, "C. O. D.," the charges were to appear on the express way-bill, and be collected upon delivery of the liquor in the ordinary way of the business of the express company. Under this arrangement the defendant, during the summer and fall of 1884, made a large number of shipments of liquor in retail quantities from his store in Shawneetown to persons in Fairfield by express, some being sent "C. O. D.," others in jugs as above described. In deciding this case, it only seems to be necessary to consider the effect of the sales made by shipment from Shawneetown to Fairfield by express, "C. O. D.," to be delivered at Fairfield by the agent of the shipper to the consignee on payment of the price. It is clear that the express agent at Fairfield was also the actual agent of the defendant in receiving and delivering the liquor shipped to Fairfield, and in collecting the money for it; for the defendant employed him for that purpose, and agreed to pay him 10 per cent. on the money collected by him, without reference to whether the liquor was shipped "C. O. D.," or by tags attached to the jugs with the price and address marked thereon. Certainly, then, as to all the packages shipped "C. O. D.," the ownership and possession of the liquor remained in the defendant, after reaching the hands of his agent in Fairfield, just as completely as before it left his store in Shawneetown, and the sale did not take place until the defendant, by his agent, received the money at Fairfield and delivered the liquor there to the purchaser. This would be true, too, even if the Fairfield express agent had not been specially employed as the defendant's agent in the handling of this liquor; for, in the case of liquor shipped by the defendant to Fairfield by express, "C. O. D.," the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company as the agent of the seller until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such cases the possession of the ex-

press company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price.

An order from a person at Fairfield to the defendant at Shawneetown for two gallons of liquor, to be shipped to Fairfield "C. O. D.," is a mere offer, by the person sending such order, to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield; and a shipment by the defendant according to such order is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser, and received the price of it. It would be different if the order from Fairfield to the defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor, under such an order, was delivered to the express company at Shawneetown, it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser,—the sale would be a sale at Shawneetown,—and if it were lost or destroyed in transit, the loss would fall upon the purchaser. But in the case at bar, by shipping the liquor to Fairfield "C. O. D.," the defendant made no sale at Shawneetown. The right of property remained in himself, and the right of possession, as well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit, the loss would have fallen upon himself. He simply acted upon the request of the purchaser, and sent the liquor to Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor. In the case of *Pilgreen v. State*, 71 Ala. 368, cited by counsel for defense, the distinction between absolute and conditional sales seems to have been overlooked.

The defendant, not having paid the special tax as retail liquor dealer at Fairfield, is guilty as charged in the indictment.

UNITED STATES v. BAREFIELD.

(District Court, E. D. Texas. February 16, 1935.)

1. CRIMINAL LAW AND PROCEDURE—WITNESS—CONVICT IN STATE PENITENTIARY—APPLICATION FOR SUBPENA OR ATTACHMENT.

A United States district court will not grant a process by subpoena, attachment, or otherwise, on application of the United States district attorney, for a party confined in a state penitentiary for assault with intent to murder, whose testimony it is desired to have in a criminal prosecution pending in such court.

2. SAME—COMPETENCY OF WITNESS—STATUTE OF TEXAS—REV. ST. U. S. § 858.

It would seem that such a witness could be excluded as a witness both under the laws of Texas and under those of the United States, if objected to by defendant.

Application for Subpœna.

Asa E. Stratton, Jr., U. S. Dist. Atty., for the United States.

Edward Guthridge, for defendant.

SABIN, J. Application by United States district attorney for a process by subpœna, attachment, or otherwise, for one Tobe Barefield as a witness in this case; said Tobe Barefield being at present a convict in the penitentiary at Rusk, Texas, that being one of the penitentiaries of the state of Texas, for assault with intent to murder. The application shows that he is a material witness for the government, and that it is believed that the state authorities will permit him to appear as a witness if he is brought before this court and safely returned to the prison at Rusk, after testifying, provided that the state of Texas is at no expense therefor. The process of subpœna is always at the command of the United States district attorney, without the authorization of this court, and witnesses, when subpœnaed under his order and discharged by him, are allowed by the court their *per diem* and mileage, and the court in this case does not feel it necessary to control the action of the district attorney by either ordering or refusing a subpœna. This court has no control over the volition of the state authorities in the matter of their bringing their state convicts before it to give testimony. If they bring them in obedience to a subpœna they will be paid like other witnesses, if ordered by the United States district attorney. The question of their competency does not strictly arise upon this motion, although it is presented to my consideration and a decision expected thereon. If an incompetent witness is placed upon the stand and sworn, and gives testimony without objection, his incompetency being known, such testimony is proper for the consideration of the jury. The defendant in this case cannot be called upon to say whether he objects to such witness or not until he is produced. But as the question of competency is again presented at this term of court it seems proper to allude to the authorities. At common law, persons convicted of crimes which render them infamous are excluded from being witnesses. Infamous crimes in this sense are regarded as comprehending treason, felony, and the *crimen falsi*. Whart. Crim. Ev. § 363, and authorities there cited. I must confess that I cannot regard the state in which a United States court is held as a foreign state, although it has a different species of jurisdiction.

Section 858 of the Revised Statutes of the United States, after providing that persons should not be excluded as witnesses by reason of color, or of being parties to a suit, and after making some provision in reference to actions by and against executors, etc., provides that in all other respects the laws of the state in which the court is held shall be the rule of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.

Article 54 of the Penal Code of the state of Texas provides that every offense that is punishable by death or by imprisonment in the

penitentiary, either absolutely or in the alternative, is a felony; every other offense is a misdemeanor; while subdivision 5 of the Code of Criminal Procedure of the state of Texas, art. 730, provides that all persons who have been convicted of felony in this state or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned of the crime for which he was convicted, are incompetent to testify in criminal actions. Article 500 of the Criminal Code of the state of Texas provides that if any person shall assault another with intent to murder, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. If the assault was made with a bowie-knife or dagger, or in disguise, the punishment shall be doubled. It would seem, therefore, as admitted, that, under the laws of Texas, the proposed witness could be excluded as a witness; and it seems to me, likewise, that he also could be excluded both under the laws of Texas and under those of the United States, if objected to by the defendant; and hence the court declines to make any order in the matter, leaving the United States district attorney and the state authorities to the use of such writ or writs of subpoena, and such voluntary action in the production of the said Tobe Barefield before the court or as a witness, as to them or each of them may seem proper and lawful to do; and hence the court declines to make any order upon the motion presented.

UNITED STATES *v.* KING.

(Circuit Court, S. D. Alabama. February 21, 1885.)

SEAMEN'S WAGES—SECTION 10 OF THE ACT OF JUNE 26, 1884.

The provisions of this section do not apply to steam-boats engaged in trade and navigating the inland waters of the United States.

Criminal Information for violation of section 10 of act of June 26, 1884.

The case is tried by the court upon the following agreed statement of facts, viz.:

It is agreed that H. Clay King was clerk of the steam-boat Mary, a vessel of 328 tons burden, which navigated the waters of the Mobile and Alabama rivers, from Mobile to Montgomery and back again, making trips once a week; that said waters are navigable, and within the admiralty and maritime jurisdiction of the United States; that on, to-wit, the thirtieth of September, 1884, the said King, as clerk of said boat, for the master thereof, did pay to Henry C. Thrower, who was acting for, or in copartnership with, John H. Wallace, 25 cents for each of the crew of said vessel shipped on board of said vessel at the time aforesaid for a trip on board said steam-boat from Mobile to Montgomery and return, whose names are mentioned in the criminal information in this case; that the manner of shipping the crew of said vessel is as follows: The said Thrower and said Wallace have an office on Front street, in Mobile,

the home port of said steam-boat, in which they keep blank contracts for the shipment of the crews or deck hands of steam-boats plying the waters of the Alabama, Tombigbee, and Warrior rivers, two of which rivers are navigable in the state of Alabama, and the other, the Tombigbee, in the adjoining state of Mississippi; that on the day aforesaid the mate of the said steam-boat Mary brought in person, or sent, with a strip of paper from the mate, which identified the person, the crew or deck hands to the office of said Thrower and Wallace to sign them up, by which he meant that the said Thrower should sign their names when they could not write, and to let them sign them when they could, to the contract between the said master of said vessel and the said deck hands for said trip or voyage. The said Thrower did let them sign, or signed for them, the said contract, and then the captain or master of said vessel, by himself or by one of the officers of said boat for him, signed the said contract, and the said Thrower signed his name to said contract as a witness. It is also agreed that the said contract shall be brought into the court and made an exhibit to the court. It is also agreed that said Thrower and Wallace, at the request of the masters of said vessels, keep a register or list of the names of the seamen or deck hands against whom any captain of said boats may have complained for desertion or general misconduct on the boats, and that, by an agreement between the captains of all the boats, men whose names are on the said list are not to be allowed to sign said contracts for any steam-boat plying said rivers, unless the captain who made the complaint withdraws his complaint, or the captain who wants to ship the man comes and requests it. It is also agreed that said Thrower and Wallace receive 25 cents for each seaman or deck hand who signs said contract and is accepted. Sometimes, after a larger crew has signed than is wanted by the captain, at the captain's request some of the names are stricken out, for which men so stricken out the 25 cents per man is not paid.

George M. Duskin, U. S. Atty., for the United States.

R. Inge Smith, for the U. S. Shipping Commissioner.

M. B. Kelly, for defendant.

BRUCE, J. This is a criminal information against the defendant, charging him with a violation of section 10 of the act of congress, approved June 26, 1884, known as the "Dingley Bill." The act is entitled "An act to remove certain burdens on the American merchant marine, and encourage the American foreign carrying trade, and for other purposes." Section 10 of the act provides "that it shall be, and is hereby, made unlawful in any case to pay any seaman wages, before leaving the port at which such seaman may be engaged, in advance of the time when he has actually earned the same, or to pay such advance wages to any other person, or to pay any person, other than an officer authorized by act of congress to collect fees for such service, any remuneration for the shipment of seamen. Any person paying such advance wages or such remuneration shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than four times the amount of the wages so advanced or remuneration so paid, and may be also imprisoned for a period not exceeding six months, at the discretion of the court. * * *"

There is an agreed statement of facts in the case, and it is insisted by the prosecution that the facts show a shipment of seamen, within the meaning of the act, on the steamer Mary, navigating the Alabama

river, by one Thrower, as the agent of one Wallace, neither of them being shipping commissioners, or master or owners of the boat, and a remuneration of 25 cents per seaman so shipped, paid by the defendant, King, as clerk of the steam-boat Mary, in violation of section 10 of the act quoted, *supra*.

It is not necessary to recite here in full the agreed statement of facts in the case; but it shows the existence of an understanding or agreement between Wallace and the masters of steam-boats navigating the Alabama and Tombigbee rivers from Mobile, as their home port, and return; that the seamen or deck hands employed on said boats are engaged by Wallace, who keeps an office on Front street, and has blank agreements prepared, to which he secures the signatures of the hands whom he engages, and keeps a record of those with whom the masters of steam-boats may have had trouble and difficulty; and for each seaman so engaged or employed for a trip or voyage the masters pay 25 cents. This arrangement is a voluntary one, depending for its existence and continuance upon the assent of the parties, and is not binding upon the hands only so far as, in its practical operation, it is the means of securing employment. It is not claimed that any law exists which requires the masters of these boats to have the services of a shipping commissioner or any other person in obtaining and engaging a crew for a voyage, nor is there any law requiring the seamen to be employed or shipped under the superintendence of a shipping commissioner or any person whatever; nor is it claimed as a fact that any charge at all is made by the masters of the steam-boats against the hands for the services paid for by them for the engaging and shipping of crews. This arrangement, by which the masters of steam-boats obtain, for a consideration, the assistance of persons in obtaining and shipping deck hands, is held to be in violation of the statute. It is not claimed that the masters may not ship their hands themselves; but the proposition is that if they require assistance of agents or persons other than themselves, that they must procure the services of a regularly appointed shipping commissioner to superintend and ship their men, so that the rights and interests of the men may be protected, as well as that of the masters of the boats, and that this was the object of congress in the enactment of this tenth section of this Dingley bill. It may admit of doubt whether the arrangement indicated and more fully set out in the agreed statement of facts in the case as to the manner in which crews are obtained and engaged for river steamers, constitutes in effect, or can be considered, a *shipment of seamen*, within the meaning of the act under consideration; and I do not discuss that question further, because, even if it is so, the first and controlling question here is whether this law has any application at all to the shipment of seamen (deck hands) on steam-boats navigating rivers such as the Alabama, Tombigbee, and Warrior.

The language of section 10, quoted *supra*, is broad and sweeping,

and if it stood alone it might be held that congress intended by it to go a step further than it had ever done before, and embrace within it cases such as the one at bar. Such, however, does not seem to have been the purpose of congress in the passage of the act of June 26, 1884. As already observed, it is an act entitled "An act to remove certain burdens on the American merchant marine." A reference to the former acts of congress upon the subject throws light upon the scope and purpose of congress in the passage of this last act which we are now considering. The act of congress of June 7, 1872, "to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen," invested shipping commissioners with many and important functions. Section 12 of this act provides that the master of every ship bound from a port in the United States to any foreign port, or of any ship of the burden of 75 tons or upwards, bound from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall, before he proceeds on such voyage, make an agreement in writing or in print with every seaman whom he carries to sea as one of the crew, in the manner hereinafter specified; * * * and by the next section this agreement must be signed by each seaman in the presence of a shipping commissioner, who shall certify the same.

By act of January 15, 1873, congress limited section 12 of the former act, and provided that the section should not apply to masters of vessels when engaged in trade between the United States and the British North American possessions, or the West India islands, or the republic of Mexico. But the operation of the shipping commissioners' act—that is, the act of June 7, 1872—was limited in a most decided manner by act of congress of June 9, 1874, which provided, that "*none of the provisions of an act entitled 'An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen,' shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports, or otherwise, or in the trade between the United States and British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage.*"

The effect of this act was not only to cut off the operation of the act of June 7, 1872, as to vessels in the coastwise trade, with the exceptions named,—that is, that in the shipping of seamen the agreements of masters with the seamen need not be signed under the superintendence of a shipping commissioner,—but it swept away all the penal provisions of the act in so far as they applied to vessels in

the coastwise trade, with the exceptions named in the repealing act. These penal provisions were for the protection of seamen. One of them, in section 8 of the act, provided "that any person, other than a commissioner under this act, who shall perform, either directly or indirectly, the duties which are by this act set forth as pertaining to a shipping commissioner, shall incur a penalty of not exceeding five hundred dollars."

The repeal of this and other penal provisions of the commissioners' act of June 7, 1872, shows that it was the purpose of congress to release masters of vessels in the coastwise trade, with the exceptions named, of the necessity of shipping their seamen under the superintendence of a shipping commissioner, and to leave masters at liberty to obtain and contract with seamen for voyages upon terms as to wages which they could secure by agreement, and contract with the seamen themselves. If congress deemed, as it must have done, that seamen upon ships in the coastwise trade did not require the protection which was afforded under the provisions of the act of June 7, 1872, then, certainly, for a stronger reason, seamen, *deck hands*, upon steam-boats navigating rivers, did not require such protection, and the conclusion is clear that the object and purpose of this legislation was, and is, to leave masters and seamen free to contract and be contracted with on such terms as they shall mutually agree upon, the courts being open to appeal for redress in cases of oppression and violation of contract obligations.

It is true that the seamen are called the wards of the admiralty, and in voyages to foreign ports, where much time is occupied and seamen are without the reach of courts of law to which they may apply for redress, and are compelled to submit to the will of the masters of the vessels,—in such cases there is good and strong reason why their contracts should be made under the superintendence of a shipping commissioner; but this has little application to seamen or deck hands upon steam-boats navigating our rivers, and if masters may contract with and ship their men themselves on terms mutually agreed upon, it is difficult to see why they may not employ agents or agencies on shore to aid them in obtaining and shipping crews. But the proposition is that if they employ any agents for such purpose, it must be the shipping commissioner and no other person. But such construction of the act would not be on a line with the legislation of congress upon the subject to which we have just adverted, and the present act is not a return to the stringent, and to some extent onerous, provision of the act of June 7, 1872, but, as the title to the act states, it is to remove burdens and not to impose them upon the merchant marine. To give section 10 the construction here claimed by the prosecution, would indicate a new, if not a wide, departure from the action of congress heretofore had upon the subject, which, had it been intended, would have been indicated more clearly and distinctly than we have it in the section under consideration.

The other and subsequent clauses of the section give force to this view of the subject, and show that the purpose was to afford protection to seamen on vessels bound on voyages to distant ports, where a protracted absence was in contemplation, and not to cases such as the one at bar.

The defendant, H. Clay King, is discharged.

See *The State of Maine*, 22 FED REP. 734.—[ED.]

BANKS and others v. MANCHESTER.¹

(Circuit Court, S. D. Ohio, E. D. March 3, 1885.)

1. COPYRIGHT—OHIO STATE REPORTS—OPINIONS, ETC., OF THE JUDGES.

The statutes of Ohio authorize the publication of the reports of the supreme court, and of the supreme court commission, of the state, (1) under the direction of the supervisor of public printing; or (2) under a contract made by the secretary of state. The official reporter, who receives from the state a fixed salary for his services, is required to secure a copyright for "each volume of the reports" published under the first method. The statute provides that when the reports are published under the second method, the contractor "shall have the sole and exclusive right to publish such reports, so far as the state can confer the same," but imposes no requirement upon the reporter to secure copyright. No authority is given anywhere in the statutes to copyright the opinions of the judges. Advance sheets of volumes, included in the complainant's contract with the secretary of state, were copyrighted by the reporter for the benefit of the state and of the complainants. The respondents published the opinions, *syllabi*, and statements of cases prepared by the judges and contained in said advance sheets. *Held*, that the copyrights secured do not cover the matter published by the respondent.

2. SAME—WORK OF OFFICIAL REPORTER.

The reporter might, in this case, copyright the volumes for the benefit of the complainants and of the state, but such copyright would protect only the portion of the volumes prepared by the reporter.

In Chancery. Hearing on bill and answer.

E. L. Taylor, for complainants.

Geo. B. Okey, for respondent.

SAGE, J. The complainants, partners under the style "Banks Brothers," and law-book publishers at the city of New York, are contractors with the state of Ohio for the publication of forthcoming volumes 41 and 42, Ohio State Reports. They seek to enjoin the defendant, who is the proprietor and publisher at Columbus, Ohio, of the American Law Journal, from publishing therein any of the decisions and opinions of the judges of the supreme court of Ohio, or of the supreme court commission of Ohio, in cases which are to be reported in either of said volumes. It appears from the bill that, under arrangements with the complainants by the proprietors of the Ohio Law Journal and of the Weekly Law Bulletin, copyrighted advance

¹Reported by Harper & Blakemore, Esqs., of the Cincinnati bar.

publications of said decisions are made at Columbus, Ohio, in supplements to those periodicals. The copyrights are secured by the official reporter in pursuance, it is averred, of the duties of his office, and for the benefit of the state of Ohio, and the protection of the rights and interests of the complainants under their said contract.

The complainants charge that the respondent has unlawfully infringed said copyrights by republishing said decisions; and that he has declared to them in writing his intention to continue so to do; wherefore they pray that he may be restrained by injunction. The respondent answers, admitting the publication of the opinions and decisions referred to in the bill, but avers that they are solely and exclusively the production of the judges of the supreme court of Ohio, and of the supreme court commission of Ohio; and that the judge, to whom the duty is assigned to prepare an opinion, prepares also the statement of the case, and syllabus, the latter being subject to revision by the judges concurring in the opinion; that the duty of the reporter is limited to preparing abstracts of arguments of counsel, tables of cases, indexes, reading proof, and in arranging cases in their proper order in the volumes of reports of said courts, for all which he is paid out of the treasury of the state a stated annual salary, fixed by law; and that he has no pecuniary interest in the publication of said reports. The respondent admits that he intends to continue said publication, but denies that the reporter has any right or authority to secure a copyright upon the publication described in the bill, or that said copyright was secured by him for the benefit of the state of Ohio, or for the protection of the rights of the complainants.

The respondent also avers that complainant, for the consideration of \$600, contracted with the proprietors of the Ohio Law Journal and of the Weekly Law Bulletin, to give to them exclusive right to publish in said periodicals said opinions and decisions, and to protect said pretended right by commencing and prosecuting, at their own cost, such suits as might be necessary; and that therefore the complainants have no interest in result of this controversy.

The provisions of the statutes of Ohio bearing upon the questions involved are referred to in the bill and in the answer. Section 437 of the Revised Statutes of Ohio empowers the secretary of state, when authorized by resolution of the general assembly, to contract with any responsible person or firm to publish the reports authorized by law, and to furnish, for the use of the state, the number of copies required to supply the state, at a cost not exceeding one dollar and fifty cents per volume, and the number of copies required to meet the demands of the citizens of the state, at a cost not exceeding one dollar and seventy-five cents per volume; also to furnish advance sheets as provided in sections 430 and 431. Section 437 further provides that "such contractor shall have the sole and exclusive right to publish such reports, so far as the state can confer the same," during the period of the contract. Sections 429-435 provide for the printing and

binding of the volumes of reports under the direction of the supervisor of public printing. These sections do not apply when, as in this case, the secretary of state is authorized to make the contract as provided in section 437.

Section 436 requires the reporter to secure a copyright for the use of the state for each volume of the reports published under the provisions of sections 429-435, but the duty of the reporter is limited to securing a copyright "for each volume of the reports so published." No such duty is imposed upon him with reference to volumes published under contracts made by the secretary of state by virtue of the provisions of section 437. Under that section,—which applies in this case,—the sole and exclusive right to publish the reports, so far as the state can confer the same, is granted to the contractor. Nowhere in the statute law relating to the publication of reports is authority given to the reporter, or to any other person, to acquire a copyright in the decisions or opinions of the judges. This is significant, in view of the unanimous opinion of the justices of the supreme court of the United States in *Wheaton v. Peters*, 8 Pet. 668, that no reporter has or can have copyright in the written opinions delivered by that court. The legislation of the state of Ohio must be considered to have been enacted with reference to that opinion, and therefore to have been intended to limit the provisions above cited to the volumes of reports, and to exclude copyright of the opinions of the judges.

It is in accordance with sound public policy, in a commonwealth where every person is presumed to know the law, to regard the authoritative expositions of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who may choose to publish them. And such publications may be of everything which is the work of the judges, including the syllabus and the statement of the case, as well as the opinion. The copyright of the volume does not interfere with such free publication. It protects only the work of the reporter; that is to say, the indexes, the tables of cases, and the statement of points made and authorities cited by counsel. *Wheaton v. Peters*, 8 Pet. 653; *Little v. Gould*, 2 Blatchf. 165, 362; *Chase v. Sanborn*, 4 Cliff. 306; *Myers v. Callaghan*, 5 FED. REP. 726, S. C. 10 Biss. 139; *Myers v. Callaghan*, 20 FED. REP. 441.

Counsel for complainants cite Judge DRUMMOND's dictum, in *Myers v. Callaghan*, 5 FED. REP. 728, that "if an adequate compensation was paid by the state to the reporter for the work done by him in preparing volumes of reports, then, whatever property there was in the volumes, arising from the labors of the reporter, ought to belong to the state and not to him." "Now," say counsel, "in Ohio the state undertakes to pay the reporter adequate compensation, and by statute that amount is all he can receive. He has no perquisites. The theory is that the state pays him for his labor, and that the result of his labor belongs to the state." And counsel proceed to claim that "this is precisely the theory upon which the state is entitled to the

decisions of the judges. They are paid a stipulated price or sum for their services, and this, by their consent,—impliedly given when they accept the office,—is in full of their services, and the result of their labors is the property of the state." Mr. Drone, in his work on Copyright, 161, states substantially the same view, although he says he has seen no sound, clear exposition of the law governing copyright in judicial decisions, and that it has not been expressly declared in any modern case that copyright will vest in a judicial decision. Mr. Justice STORY, one of the judges who concurred in the decision in *Wheaton v. Peters*, said, in *Gray v. Russell*, 1 Story, 21, that while it was held in that case that the opinions of the court, being published under the authority of congress, were not the proper subject of copyright, it was as little doubted by the court that Mr. Wheaton had a copyright in his own margined notes, and in the arguments of counsel, as prepared and arranged in his works. Whether the state, through its reporter, can secure a copyright in the opinions of the judges, is, however, not a question arising, nor can it be decided, in this case. It is sufficient to say that the state has not adopted legislation for such copyright; that the enactments providing for copyright of the volumes of reports, or of the reports, do not authorize copyrights of the opinions of the judges.

The averments of the answer respecting the contract by and between the complainants and the proprietors of the law journal, at Columbus, which, with complainants' consent, publish the opinions of the judges, complainants binding themselves to protect them in their assumed exclusive right of publication, are not material. If the reporter had the right to secure copyright in those opinions for the benefit of the complainants, the complainants had the right to make the arrangement referred to, and it would be not only the right but the duty of complainants to institute suits for the protection of the publishers in their exclusive license. But the reporter has no such right. The statute gives him no power, no authority or right whatever, with reference to copyright of even the volumes included in complainants' contract. Whatever sole and exclusive right to publish such reports the state could confer, was, by the express terms of the statute, conferred upon the complainants. As held in *Myers v. Callaghan*, the reporter is entitled, in the absence of express legislation to the contrary, to copyright his volumes of reports, to the extent that the same consist of the work of his own hand, notwithstanding he may not have a copyright in the opinions of the court. And in this case he might secure copyright in the volumes of reports, not for his own benefit, but for the benefit of complainants; but the copyrights he has attempted to secure in the opinions of the judges are invalid.

The bill will be dismissed at complainants' costs.

GORDON and others v. ST. PAUL HARVESTER WORKS and another.¹

(Circuit Court, D. Minnesota. March, 1885.)

1. EQUITY PRACTICE—HEARING ON DEMURRER AND PLEA—RULE-DAY.

Complainants filed their bill November 10, 1884, and on January 3, 1885, one of the defendants filed a demurrer, and the other defendant filed a plea to part of the bill and an answer to the residue, the December term of court not having adjourned. On January 21st complainant had the demurrer and plea set down for argument on rule-day, and served written notice on defendants. *Held*, that the demurrer and plea could be disposed of on the rule-day.

2. PATENTS—INFRINGEMENT—ASSIGNMENT BY INFRINGER FOR BENEFIT OF CREDITORS—STATE INSOLVENT LAW—MULTIFARIOUSNESS.

A bill averring the infringement of a patent by a corporation and its assignee under a state insolvent law, and that such assignee is about to distribute the assets of the insolvent corporation among its creditors without regard to the rights of complainant, and praying for an injunction, and for a decree to account for and pay over all such gains and profits as have accrued or arisen from the sale and use of complainant's patent, is not multifarious.

3. SAME—JURISDICTION OF CIRCUIT COURT.

Such a suit is properly brought in the United States circuit court.

In Equity.

Geo. D. Emery, for complainants.

H. J. Horn, for defendants.

NELSON, J. The complainants filed their bill on November 10, 1884, against the St. Paul Harvester Works, a corporation duly organized under the laws of the state of Minnesota, and Lyman D. Hodge, charging infringement of certain letters patent, and praying relief. On January 3, 1885, the corporation filed a demurrer to the bill, and the defendant Hodge filed a plea to part and an answer to the residue. On January 21st the complainant's solicitor requested the clerk to enter an order setting down the demurrer and plea for argument on the rule-day, February 2, 1885, and gave defendants' solicitor written notice that the plea and demurrer had been set down for argument, and would be brought on therefor at the rule-day, to-wit, February 2d, at the opening of court on that day, or as soon as counsel could be heard. At the time of the hearing the solicitor of the defendants objected, and urged that the argument could not be heard until the next June term of the court. This objection is not sustained. The plain implication of the equity rules is that pleas and demurrers may be disposed of at rule-day; but there is another reason why the objection is not well taken. The December term had not adjourned at the time the demurrer and plea was filed, and at the time the notice of argument was served upon the defendant's solicitor the suit was pending in court on the docket under equity rule 16,

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

and the sufficiency of the plea and demurrer could be called up and tested without formal notice, in term, in presence of counsel, or by proper notice in his absence.

In the argument, counsel fully presented their views, and I will now dispose of the plea and demurrer.

And, *first*, upon the demurrer. The bill alleges that the complainants are sole owners of letters patent for a new and useful improvement in grain binders for the district of Minnesota and the entire territory of the United States, except the state of Michigan, and that the improvements have been extensively applied to practical use; and further alleges that by virtue of certain assignments of certain interests and rights in and to letters patent, the entire right, title, and interest in and to the inventions described in the letters patent, naming them, were secured to your orators. And the bill charges infringement, prior to the commencement of this suit by the defendant harvester works, of the patents owned by complainants; and it is further alleged that the said defendant harvester works, on or about May 31, 1884, assigned and transferred to the defendant Hodge all its property and assets in trust, and for the benefit of its creditors, but how much and of what value is unknown, and prays a discovery thereof, and charges that since the assignment aforesaid the said Hodge has continued the business of said St. Paul Harvester Works, and has made and sold a large number of binding-machines embodying the patented improvements aforesaid, and thereby infringed upon the exclusive rights of the complainants; and that the said Hodge, as assignee, threatens and is about to distribute to the creditors of the St. Paul Harvester Works the moneys realized by him from the property and assets aforesaid, without regard to the rights and claims of your orators against the said St. Paul Harvester Works, unless restrained by the injunctive order of this court. There is an allegation that the improvements described in the several letters patent are so nearly allied in character as to be capable of joint as well as several use in grain-binding machines, and that the said inventions, or substantial and material parts described in the said letters patent, have been and are used conjointly by the said defendants, etc.

A writ of injunction is prayed for, and a prayer for a decree to account for and pay over all such gains and profits as have accrued or arisen to, or been earned or received by, said defendants from the unlawful use of said inventions, and from the infringement thereof as aforesaid, and to pay the damages sustained, etc. Copies of the several letters patent are attached to and made a part of the bill. The demurrer is interposed for the reason, as alleged, that the bill is exhibited against the defendants for several and distinct matters and causes which have no relation to each other, in which, or in the greater part thereof, it is urged that the defendant the St. Paul Harvester Works is not in any way interested or concerned, and ought not to be

implicated, and that the matters and alleged causes of action pleaded against Hodge are distinct from the alleged cause of action pleaded against the defendant the St. Paul Harvester Works, and ought not to have been joined together in one bill; that the bill is multifarious.

The rule invoked by the counsel for the defendant, that two or more distinct subjects cannot be embraced in the same bill, has no application to this case. The pleadings show that there is a privity of connection between the corporation and Hodge in reference to the object of the action and the subject-matter thereof. Hodge is the assignee by voluntary assignment for the benefit of creditors. He is a trustee required to execute the trust created by the corporation; and if any property or effects remain after its fulfillment, he must turn it over to the *cestui que trust*. He is alleged to be in possession of all the assets and moneys of the defendant the St. Paul Harvester Works by a voluntary transfer, which moneys, or a portion thereof, the bill charges were gains and profits derived from the infringement of the complainants' improvements designated in the letters patent. If in equity, as is the settled doctrine, an infringer is treated as a trustee of the patentee of the gains derived by him from the infringement, (1 Ban. & A. Pat. Cas. 485,) and is held accountable accordingly, certainly an assignee of such gains in trust for creditors is a proper party for the purpose of obtaining a just account of these profits. He is a necessary party, upon the same principle as an agent who represents his principal and manages his business. How far and to what extent the funds alleged to be in his hands would be affected if the complainants should obtain a decree is not involved on this hearing. The bill is not open to the criticism suggested by the demurrer, and the same is overruled.

Secondly. The defendant Hodge files a plea to part of the bill, and claims that he cannot be compelled to render account for any such gains or profits as may have been earned by the alleged infringement of complainants' rights by the St. Paul Harvester Works prior to the assignment to him; and he urges that such voluntary assignment to him, in trust for creditors, is in law a bar to all relief claimed in the bill by the owners of the alleged infringed letters patent. The implication of the plea is that his conduct as trustee under the assignment, and the management of the property in his possession, is to be regulated exclusively by the laws of the state of Minnesota, and that he is responsible to the district court of Ramsey county for the faithful discharge of his duties, and therefore any claim which the complainants may have for infringement of letters patent must be presented to the assignee, and if the infringement is disputed by him, settled and adjudged by the state court. I do not agree to this proposition. If the defendants confess the allegations and charges of the bill, and the amount of alleged damages, it may be that the only method of enforcement of the complainants' claim against the insolvent corporation, or at least the quickest way of sat-

isfying the decree, would be to file the claim as settled, and participate in the funds; but as the defendants do not confess the infringement, or any of the matters alleged in the bill, to be true, except as stated in the plea, the complainants can litigate their rights in this court, and the fact of an assignment made by the insolvent corporation to the defendant Hodge is no bar to the prosecution of their suit.

I do not see how the insolvent law of the state of Minnesota can affect the proceeding to enforce the rights of a patentee against an infringer. If the defendants will admit the charge of infringement, and permit a decree to be entered settling the amount of the complainants' claim, there would be some force in the suggestion that the complainants must apply for payment under the laws of the state of Minnesota regulating assignments for the benefit of creditors. It is true that the complainants, if they were so disposed, could present their claim to the assignee and abide by his decision; but they are not compelled to do so, and no state law can deprive the complainants of the right to litigate disputed infringements of letters patent in this court.

This is not an action involving contract rights between the parties thereto, but is a case arising under the patent-right laws of the United States, and the jurisdiction vested in the courts of the United States is exclusive of the courts of the state. Rev. St. § 711, p. 135.

The plea is overruled.

McFARLAND and another v. SPENCER and another.

(Circuit Court, S. D. New York. February, 1885.)

PATENTS FOR INVENTIONS—METAL TENON FOR BLIND-SLATS—PATENT No. 76,491.

Letters patent No. 76,491, issued to William McFarland and John H. Campbell, April 7, 1868, for a metal tenon for blind-slats, *held* valid, and infringed by defendants.

In Equity.

Peter Van Antwerp, for complainants.

Edward S. Clinch and *E. T. Rice*, for defendants.

COXE, J. The complainants are the owners of letters patent No. 76,491, issued to William McFarland and John H. Campbell, April 7, 1868, for a metal tenon for blind-slats. The object of the invention is to provide tenons for blind-slats when the original tenons are broken off or injured so as to become inoperative. The following diagrams will serve to illustrate the invention:

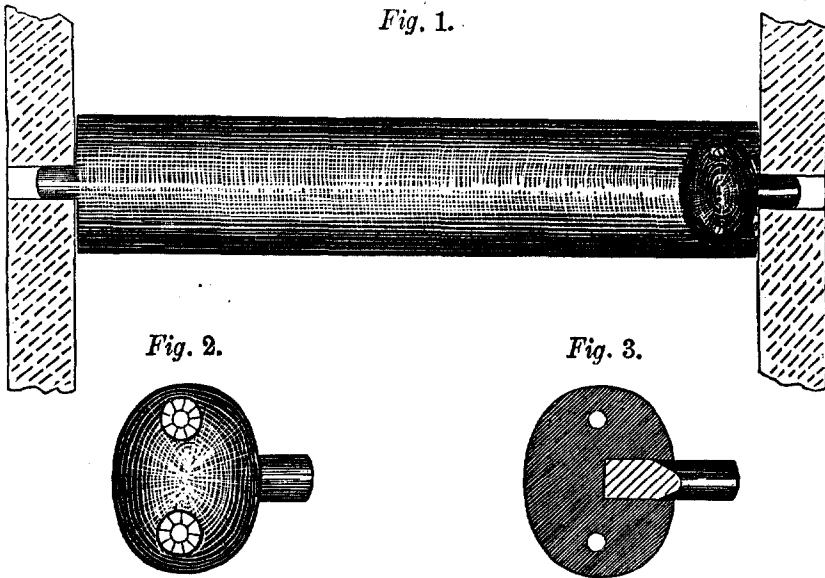


Fig. 1 represents the tenon applied and fitted to a blind-slat, and working in the mortise of the frame, in place of the one broken or removed; Fig. 2, the face view of the tenon, with escutcheon plate on its inner end; Fig. 3, the same reversed, showing the connection of the escutcheon plate to the tenon by means of a beveled shoulder. The inventor declares in the specification that "heretofore the breaking off or the decay of a tenon has caused the entire loss of the slat, there being no means or device known, previous to my invention, whereby the tenon could be restored or repaired without incurring too much expense; and furthermore, the repair or restoration of a broken tenon is difficult without the removal of one of the side-bars of the frame." The advantages of the invention are economy, simplicity, symmetry, and durability. It is much cheaper to use the metal tenon than to remove the slat. A person possessed of a pocket-knife and a very limited amount of mechanical skill can make the repair. Prior to the invention it was necessary to take down the blind, separate the frame, remove the broken slat, substitute the new slat, attach it to the hand-rod which operates the series of slats, and readjust the frame. All this required time and skill, was expensive and inconvenient, and when the work was done it was found almost impossible to make the new slat correspond in color with the old ones. The device is an exceedingly simple and unpretending one,—so simple that, to one who sees it now, the wonder is that it did not occur to some one long before the date of the patent. But it never did. Criticism that an invention is so plain that it must be perceived by all, comes with poor grace from those who did not themselves perceive it.

The answer is confined to specific denials of the allegations of the complaint; no affirmative defense is pleaded. The defendants introduced in evidence a patent granted to George R. Clark, March 5, 1867, for an "improved metallic blind-slat, clasp, and pivot." It consists of a metal cap, carrying a tenon, which fits on the end of the slat. The merits claimed for it are that it prevents longitudinal splitting, and furnishes a pivot of great durability for the slat to turn on. Should a tenon become broken, the frame must necessarily be dismembered, precisely as in the case of the wooden tenon, in order to repair it. The Clark device is wholly dissimilar from that of the complainants. The defendants also, under objection, introduced testimony showing that in 1837 or 1838, 200 tenons were made, to fill a special order, out of 16-gauge strap-iron, the strap being bent so as to grasp the slat on both sides, and a pivot to swivel the slat being riveted to the bent end. These tenons could not be used for purposes of repair, except by taking the frame apart. It required mechanical skill to apply them, and they could be made only on special order, as it was necessary that they should exactly fit the slat. The defendants also proved that between 1849 and 1851 the iron shutter of a building on Reade street, New York, was repaired with a tenon like the complainants'; also that in 1844 and 1846, in Germany, similar tenons were used in the original construction of iron shutters, and that for 300 years shutters so made had been used in the tower of the church at Wittemberg, to the front door of which Martin Luther nailed his theses. It will be seen that even had the defendants pleaded prior use, as required by section 4920 of the Revised Statutes, there is nothing in this testimony which anticipates the complainants' invention. There is no allegation that the inventor or other persons here had knowledge of the alleged prior use in Germany; but in any view the evidence is wholly inadequate to defeat the patent. As showing the state of the art, the testimony, though involved in obscurity and doubt, may be admissible, and, were the question one of infringement, such proof might require the narrow construction of a broad claim; but it is obvious that it cannot avail the defendants where they deal in the identical contrivance covered by the patent. No one, so far as the record shows, ever used, prior to the patent, a tenon like the complainants,' on wooden blind-slats, for the purposes of repair. This is what the invention covers.

There should be a decree for the complainants for an injunction and an account, with costs.

MELLON v. SMITH-DAVIS MANUF'G Co. and others.

(Circuit Court, E. D. Missouri. March 2, 1885.)

PATENTS—METALLIC SPRING-BEDS.

Letters patent No. 238,703, granted to Peter A. Mellon for an improvement in "metallic spring-beds," held void for want of novelty.

In Equity.

Suit for the infringement of letters patent No. 238,703, granted to Peter H. Mellon for an improvement in metallic spring-beds. The improvement relates, as the specifications state, "to a spring-bed made entirely of metal, and it consists in duplicate iron frames, to which the bottoms and tops of the outer row of the double spiral springs are secured by wire; the inner rows of springs being connected to each other and to the outer row by means of open-wire links." The inventor claims as his invention "the combination in a spring-bed of the frames, A, A', braces, D, and double spiral springs, C, connected to each other and to the frames substantially as and for the purpose set forth."

W. M. Eccles, for complainant.

Finkelburg, Rassieur & Dexter Tiffany, for defendants.

TREAT, J. The several claims in plaintiff's patent are for the combinations therein respectively named. As to some of such combinations, obviously there is no infringement. From the state of the art at the date of said patent, no novelty as to the alleged invention is discernible. The court can detect no exercise of inventive faculty wherefrom the mechanical arrangements named are patentable, within the purview of the patent law. There is no suggestion in the patent as to adjustability, and indeed the specifications show that the opposite was in the mind of the patentee. Soldering, welding, or the use of reversely screw-threaded couplings would make the connection of the two parts fixedly rigid. Such, also, would be the effect of a collar as in the patent described. The court, therefore, is of the opinion that the patent is void for want of novelty. *Morris v. McMillin*, 5 Sup. Ct. Rep. 218.

Bill dismissed, with costs.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

THE PACIFIC.¹

(District Court, W. D. Pennsylvania. February 20, 1885.)

1. SEAMEN'S WAGES—LEAVING VESSEL.

A seaman was hired without signing shipping articles on a vessel about to proceed on a voyage from a port in one state to a port in a state not adjoining. *Held*, that he could leave the vessel at any place.

2. SAME—REV. ST. §§ 4520, 4523.

Sections 4520 and 4523 of the Revised Statutes of the United States *held* to apply to the hiring of seamen on vessels navigating rivers of the interior states.

3. SAME—WAGES NOT FORFEITED.

A seaman left a vessel at a place where a substitute could easily be obtained, and the boat suffered no detriment by reason of his refusal to work. *Held*, not to be such misconduct as would forfeit his wages for the time he performed his duty.

In Admiralty.

On March 14, 1884, Taylor Harlan, the libellant in this case, was hired by the mate of the steam tow-boat Pacific as a deck hand on said tow-boat while she was lying at the port of Pittsburgh, Pennsylvania, without any shipping articles being signed. The tow-boat Pacific was upwards of 50 tons in burden, and was engaged in navigating the Monongahela and Ohio rivers. At the time of the hiring of libellant nothing was said about the duration of the voyage of the Pacific or the port to which she intended going, but it was understood that Harlan should receive the same rate of pay that other deck hands were getting for similar services. The Pacific made up a tow of coal barges and proceeded down the river to Louisville, Kentucky, where she left her loaded barges, and the same day started back for her home port with three empties. On the twenty-second day of March, 1884, the Pacific arrived at a coaling station called Ludlow, a small town three miles below Covington. Here the mate ordered the watch on deck to carry coal from a flat into the tow-boat. Harlan, the libellant, having, as he testified, sprained his wrist by a fall some weeks previously, refused to obey the mate's order, and said he was going to quit work. The mate referred him to the captain, who told him unless he performed his duty he would forfeit his wages for the entire trip, and on his continued refusal to work ordered him ashore, and threatened to arrest him if he did not leave the boat. The libellant went ashore, and on his arrival at Pittsburgh libeled the Pacific for his wages for the eight days that he had worked on the steam tow-boat. It was admitted that the rate of wages for that trip for deck hands was \$35 a month.

Albert York Smith, for libellant, cites, *inter alia*:

Sec. 4520, Rev. St. Every master of any vessel of the burden of 50 tons or upwards, bound from a port in one state to a port in any other than an

¹From the Pittsburgh Legal Journal.

adjoining state, except vessels of the burden of 75 tons or upward, bound from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall, before he proceeds on such voyage, make an agreement in writing or in print, with every seaman on board such vessel except such as shall be apprentice or servant to himself or owners, declaring the voyage or term of time for which such seaman shall be shipped.

Sec. 4523. All shipments of seamen made contrary to the provisions of any act of congress shall be void; and any seaman so shipped may leave the service at any time, and shall be entitled to recover the highest rate of wages of the port from which the seaman was shipped, or the sum agreed to be given him at his shipment.

When seamen are shipped without signing articles they may leave the service at any time. Desty, Shipp. & Adm. § 184; *Graham v. The Exporter*, 21 Int. Rev. Rec. 110; *The Fremont*, 10 Amer. Law Reg. (N. S.) 340.

Every trivial act of disobedience will not work a forfeiture of wages.

Leaving in a place where the master could easily obtain a substitute is not desertion. Desty, Shipp. & Adm. §§ 181, 184; *The Crusader*, 1 Ware, 437.

Geo. C. Wilson, for respondent.

ACHESON, J. I do not see that it can be denied that this case comes within sections 4520 and 4523 of the Revised Statutes. *Graham v. The Exporter*, 21 Int. Rev. Rec. 110; *The City of Fremont*, 2 Biss. 415. Hence the libelant had the right to quit the boat without being chargeable with desertion. *Id.*; *The Crusader*, 1 Ware, 438. Having thus a right to leave the vessel, he is entitled to wages during the time of his actual service, unless he forfeited them by reason of his alleged misconduct. Now he swears that he had sprained his wrist, and that this was his reason for declining to aid in coaling the boat. He should have made this explanation to the mate at the time; but, still, I cannot say his failure to do so should deprive him of his wages. He did state the fact to Capt. Gould before he left finally. The boat suffered no detriment by reason of the libelant's refusal to assist the other hands on this occasion, or by his leaving the vessel at Ludlow; and, upon the whole, I do not perceive upon what just ground his claim for wages can be denied.

Let a decree in favor of the libelant be drawn.

THE CHASCA.¹

(District Court, S. D. New York. February 11, 1885.)

SUFFICIENCY OF DUNNAGE—PERIL OF THE SEA.

The bark C., laden with nitrate of soda, in bags, while on a voyage from Pisagua to Hampton Roads, under a charter of affreightment which exempted her from liability for losses from perils of the seas, encountered heavy weather, and was thrown on her beam ends, in which position she lay for about 48 hours. She was finally nearly righted. On arrival she was found badly strained and unseaworthy; and about 200 tons of the soda had been dissolved in washed-out spaces, 30 feet long by about 6 wide, along the bilges on each side, abreast of the main hatch. The dunnage was so placed as to be held in position by the bags only. On arrival, the dunnage along the washed-out places was found to have fallen down. In all the rest of the ship it was in proper place. No specific negligence in respect to the dunnage was alleged in the libel; and no evidence was given of any custom to fasten the side dunnage. The respondents proved that the vessel was dunnaged in the usual manner. *Held*, that the water was admitted through the straining of the vessel when thrown on her beam ends, which dissolved a portion of the cargo, by reason of which the dunnage fell before the pumps could be made effective; and the dissolving of the cargo, after the dunnage was down, continued for the rest of the voyage. *Held, also*, that the weight of proof showed that sufficient open spaces were left by the dunnage to conform to the custom, and that, as the bark was dunnaged in the usual manner at the place of shipment, the court had no right to assume that it was negligence on the part of the bark to rely upon the cargo to keep the dunnage in its place, there being no contrary evidence on that point; that the damage, therefore, resulted from a peril of the sea, and the vessel was not liable.

In Admiralty.

Sidney Chubb, for libelants.

Owen & Gray, for claimants.

BROWN, J. This libel was filed to recover damages for the non-delivery and loss of about 200 tons of nitrate of soda, part of a cargo of about 900 tons, or 6,546 bags, which were shipped at Pisagua, Chili, on board the bark Chasca, bound for Hampton Roads and orders, in June, 1883. The bark was chartered to the libelants under a charter of affreightment that exempted her from liability for losses by perils of the seas. The question litigated was whether the loss of the nitrate is to be ascribed to perils of the sea, or to insufficient or improper dunnage.

The bark sailed from Pisagua on June 21st. About the middle of July she met with very heavy weather, and a succession of gales, lasting about three weeks. On the nineteenth of July, in a very severe gale, she was thrown upon her beam ends, shifting her cargo between-decks to the port side. She lay in that condition for about 48 hours, in a high sea; after which she wore round so as to be upon her port tack. She was then partially righted by trimming the cargo between-decks, though still having a considerable list to port, which remained

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

during the rest of the voyage. She arrived at Hampton Roads about October 25th, unseaworthy and cranky, through loss of so much cargo in her lower hold, and was towed to New York about the first of November. On examination there was found in her lower hold a space of about 30 feet in length by 6 or 8 feet in width, in the wings on each side of the ship, abreast of the main hatch, where the bags were wholly or partially empty, being washed out by water; and the side dunnage there was nearly all down. Forward and aft of this washed-out space, on each side, the bags were dry and intact; and the dunnage was in place as when loaded. There was no shifting of the cargo in the lower hold. On discharging the cargo it appeared that about 100 tons on each side had been dissolved and lost in these washed-out spaces. The cargo in the center of the ship, fore and aft, over the keelson, and to the extent of four tiers of bags on each side of the keelson, was uninjured. It is evident that the loss of the soda arose through its being dissolved in the water that came in contact with it along the bilges, as the vessel rolled from side to side; while there was at no time sufficient water to reach above the height of the dunnage along the keelson amid-ships, as the water washed from side to side.

The weight of testimony is clearly to the effect that the cargo was well dunnaged, and in the usual manner, when loaded, giving about a foot of space above the floor of the hold, and from 14 to 16 inches along the turn of the bilge. Two witnesses swear to this positively. It is confirmed by the condition of the dunnage forward and aft of the washed-out spaces, as testified to by careful observers; and there is no reason to suppose that it was different abreast of the main hatch from what it was elsewhere. The testimony, based on the examination made after the dunnage was all down in the washed-out spaces, is insufficient to countervail this proof. There is no question that the vessel encountered very severe weather. Upon arrival at Hampton Roads she showed nearly all over her marks of very severe strain and injury. These injuries, and the leaks arising from them, would naturally produce all the water in the hold necessary to account for the loss. Mr. Reed, a very competent expert, so testifies, and no one contradicts it. A clear mark of a water-line was apparent on both sides of the ship along the washed-out spaces. This was about two feet above the floor, as stated by some of the libellant's own witnesses. Mr. Reed, for the defense, states this with more particularity, and testifies that no dunnage could have prevented the loss of cargo with such a depth of water along the bilges. Water at the point of saturation holds in solution about half its weight of nitrate of soda. To dissolve and carry off 200 tons of nitrate of soda, 400 tons at least of water must, therefore, have passed through the hold and the ship's pumps; or an average of over four tons a day from the time the bark was thrown upon her beam ends until she arrived at Hampton Roads. The fact that so great an amount of water was necessary to carry off

this soda is cited by the libellant, and, as I think, conclusively, to show that neither the whole loss, nor, indeed, any great part of it, took place during the 48 hours' time that the vessel was lying upon her beam ends. A small fraction of the amount of water necessary to dissolve all this soda, if it were in the hold at any one time, would have submerged nearly all of the cargo there; whereas, the fact that along the keelson the cargo was not injured, shows clearly that there could have been but a comparatively small amount of water in the hold at any one time. Four tiers of bags on each side of the keelson were unharmed; only the outer three tiers were more or less damaged. That the loss of the nitrate was gradual, and by a long-continued process, is further proved by the fact that the crankness of the bark, which arose only from the loss of nitrates, increased gradually up to the time she reached Hampton Roads.

These circumstances, it seems to me, indicate clearly enough the way in which the loss of the nitrate took place. When the bark was thrown upon her beam ends her leaks increased, as a consequence of the severe strain on her hull; and as the pumps were unable to reach the water along the port side while the ship lay in that position, the water accumulated there until, at the turn of the bilge, it rose above the 14 or 16 inches space allowed by the dunnage. Lying in this position for 48 hours in a heavy gale and rolling badly, the nitrates in the bags upon the port side were rapidly dissolved, and the dunnage, which depended upon the bags to hold it in position, being thereby loosened, became wholly disarranged and broken down. The bags at the sides against the dunnage were but two tiers high, and thence towards the center were piled gradually higher. When the bark wore round and came upon her port tack, with heavy weather still continuing and much rolling of the ship, the accumulation of water at once passed from the port side to the starboard side, rising at once above the dunnage there also, and soon producing on that side the same results by dissolving the lower bags and throwing down the dunnage. In the severe weather and the high sea the pumps were not able to be worked so as at once to bring the accumulation of water that passed from the port to the starboard side down below the dunnage in the starboard bilges, and in this way the water lines on both sides, as observed by the witnesses, were probably formed. When the captain and others went down into the lower hold after the heavy weather had subsided, about the fifth of August, *i. e.*, between two and three weeks after the vessel was thrown upon her beam ends, they found the dunnage along the washed-out spaces all disarranged and down on each side. They endeavored to replace it to some extent, but could not do so effectively. No lights could be taken into the hold for fear of an explosion. During the remainder of the voyage, therefore, there was, in effect, no side dunnage at all along the washed out spaces to serve as a protection for that part of the cargo against the water that usually runs along the bilges. Hence

the bags were constantly exposed to the action of water there, and were constantly dissolving and settling down. In the ordinary rolling of the ship nothing that the pumps could do would prevent this process from going on continually in some measure, and in rough weather the action of the water would be more rapid and destructive, and this would be still further increased by the increasing crankness of the vessel through the loss of cargo. I do not perceive any special difficulty in the fact testified to, that the greater loss was upon the starboard side; for the loss arose chiefly through the breaking down of the dunnage caused by the water taken in, that could not be reached by the pumps, in the gale of July 19th. If the bark afterwards sailed more on the port tack than on the starboard tack, the action of the water and consequent loss would be greater, because longer continued, on the starboard side.

In this way, therefore, there is no doubt, I think, that the severe gale of the nineteenth of July was the true cause of the loss. Had the side dunnage and the floor dunnage been securely fastened at the bilges, otherwise than by the bags themselves, comparatively little damage would probably have been done. If it was the custom with such cargoes to fasten the dunnage securely, then the neglect of this precaution would have made this bark liable. The case of *The Tommy* is cited, in which the omission to fasten the dunnage to prevent its falling in rough weather was held negligence, for which the ship was liable. 16 FED. REP. 601, 607. But the cargo there was of a wholly different character. To rebut the charge of negligence, it is sufficient to show that the ship has been dunnaged in the manner usual and customary for such cargoes. *Shear. Neg.* § 6; *Baxter v. Leland*, 1 Blatchf. 526; *Lamb v. Parkman*, 1 Spr. 343, 351; *The Titania*, 19 FED. REP. 101, 107, 108; *The George Heaton*, 20 FED. REP. 323; *Clark v. Barnwell*, 12 How. 283; 3 Kent, *217.

The evidence in this case is to the effect that the bags of nitrate formed a very compact and solid mass; that the dunnage which, in this case, was without other fastening than such as the bags afforded, was secured in the usual and customary manner. Of the various witnesses examined by the libelants, I have found none who testify that it was usual or customary to secure dunnage otherwise than was done in this case. The dunnage of the rest of the cargo was in place, and is proved to have been done in the customary manner. I have no right to assume, therefore, that it was negligence in the ship to rely upon the bags to keep the dunnage in place, when it appears that such has been the usual practice with cargoes such as this.

There was no proof that the bark was not seaworthy when she left Pisagua. The water which dissolved the nitrates did not reach the cargo through her decks, nor, as in the case of *Hubert v. Recknagel*, through defects for which the ship is answerable. 13 FED. REP. 912. The cargo between decks was uninjured. The water plainly reached the hold through leaks in the sides or water-ways

caused by general strain. There was evidently no lack of diligence on the part of the bark in handling the pumps. The log and the proof show that they were well attended to. And, as I have said, there is no proof of neglect to dunnage this cargo in the way customary for such cargoes. The loss is attributable, therefore, to the perils of the sea originating in the severe gale of July 19th, and the throwing of the bark upon her beam ends. This was clearly a sea peril; and the same cause so disarranged the dunnage, without the ship's fault, as to subject the cargo to constant loss afterwards, which the vessel could not prevent. This was still, therefore, a peril of the sea; and for such loss the ship, under the exceptions of this charter, is not liable. *The Shand*, 10 Ben. 294; *Transportation Co. v. Downer*, 11 Wall. 134; *Clark v. Barnwell*, 12 How. 272; *The Titania*, *supra*. In the case of *The Sloga*, 10 Ben. 315, cited by counsel, the evidence showed that the brig, though encountering severe weather, suffered no considerable injury, nor any leakage approximating to that in the present case, nor were there any such special causes of loss as existed here.

The libel is dismissed, with costs.

DUDGEON WATSON.

(Circuit Court, S. D. New York. March 7, 1885.)

1. EQUITY—PLEADING—COMPLAINANT NON COMPOS MENTIS—PLEA.

A plea alleging that complainant "was at the time of the commencement of the suit *non compos mentis* and incapable to sue," but failing to allege that he has been so found by inquisition or that any committee has been appointed, is bad.

2. SAME—PRACTICE—MOTION TO STRIKE BILL FROM FILES—STAY.

The proper practice in such a case is by an application to the court to strike the bill from the files because filed without authority, or to apply for a stay of proceedings until a committee or next friend may be appointed.

In Equity.

Edward Wetmore, for complainant.

Jas. McKeen, for defendant.

WALLACE, J. The plea of the defendant alleging that complainant "was at the time of the commencement of the suit *non compos mentis* and incapable to sue," does not allege that he has been so found by inquisition or that any committee has been appointed. In the absence of such an allegation there is no authority for such a plea. Mitf. Pl. (4th Ed.) 229; Mitf. & T. 320. The proper practice in such a case is by an application to the court to strike the bill from the files because it has been filed without authority, owing to the mental incapacity of the complainant, or to apply for a stay of proceedings until a committee or next friend may be appointed. *Wartnaby v. Wartnaby*, 1 Jac. 377; *Attorney General v. Tyler*, 2 Eden, 230; *Norcom v. Rogers*, 16 N. J. Eq. 484. The court can then ascertain whether there is any reasonable foundation for suspending the progress of the suit. It would be intolerable to permit a defendant whenever so disposed to challenge the mental capacity of a complainant by a plea, and the practice might lead to grave abuses. The defendant has no interest in such an inquiry beyond being protected from a vexatious suit. Any person may volunteer to act as a next friend and bring a suit for an insane person when no committee has been appointed, and the court will entertain it and decide its merits. *Jones v. Lloyd*, 43 Law J. (Ch.) 826, against the objections of the defendant. The person thus officiously constituting himself the protector of the lunatic does so at his risk and may be compelled to pay the defendant's costs, and must establish the propriety of his act if called to account by a committee subsequently appointed. The solicitor who files a bill assumes the same responsibility.

The plea is overruled.

v.23F,no.4—11

FISHER v. PORTER.¹

(Circuit Court, D. Nebraska. February 27, 1885.)

1. MORTGAGE—REFORMATION AND FORECLOSURE—MISTAKE IN DESCRIPTION OF PROPERTY.

Where the uncontradicted evidence, in a suit to reform and foreclose a mortgage, shows that there was a mistake made in describing the property intended to be covered by it, the mortgage will be reformed so as to carry out the intention of the parties.

2. SAME—USURY—AGENT RETAINING COMMISSION.

When an agent who negotiates a loan, secured by mortgage, bearing 10 per cent. interest, which is legal at the time, retains as a commission 10 per cent. of the amount of the loan, the transaction will not be held usurious when it appears that the mortgagee did not share in the commission retained, or agree to do so, and that the agent was acting solely as agent of the mortgagor.

Suit to Reform and Foreclose Mortgage.

Mayne & Hunter, for complainant.

Geo. S. Smith and Geo. W. Doane, for respondent.

DUNDY, J. There was a mistake made in the mortgage, in properly describing the land intended to be covered by it. This is uncontradicted. The mortgage must, therefore, be reformed so as to carry out the intention of the parties.

The defense of usury relied on is not sustained by the proof, especially if the later decisions in this court are to be followed in determining that question. The Porters applied to Tullys, of Council Bluffs, to borrow \$1,900. Tullys was a loan broker, whose business it was to procure loans for others, he charging a large commission therefor. The Porters specially employed him to negotiate a loan for them, and agreed to pay him 10 per cent. commission if he procured for them the \$1,900 desired. This he did. The money came into his hands, and he retained his commission according to agreement. This he had a right to do, unless he (Tullys) was the agent of Fisher, the mortgagee. Tullys went to Plattsmouth to look after the matter, prepared all the papers, did all the business for the Porters, received the money, kept his commission, and gave to the Porters the balance. There is no testimony in the record that shows that Fisher, the mortgagee, ever received, or was to receive, anything whatever from the Porters, except the principal of \$1,900, and interest thereon at 10 per cent. per annum. That was lawful at the time. There is nothing that connects Fisher in any way with the commission retained by Tullys, nor is there anything that shows Fisher even knew of that part of the transaction. Tullys expressly says in his testimony that he was not agent for Fisher, and did not represent him, and that he was acting solely for the Porters. If Fisher had shared in the commission retained, or had agreed to do so, or if Tullys had in any sense been agent for Fisher, then Fisher would be

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

held responsible for Tullys' acts. As it is, he was not responsible therefor.

Decree will be allowed plaintiff for amount due on mortgage, and for taxes paid by him on the land.

NORTH v. KNOWLTON and others.¹

ORTON v. NORTH.¹

(Circuit Court, D. Minnesota. March, 1885.

MORTGAGE—PRIOR RECORD OF SECOND MORTGAGE—CONSTRUCTIVE NOTICE—FORECLOSURE.

The rule that if the owner of a prior unrecorded mortgage puts it on record before a subsequent purchase of the property the record will be constructive notice to the purchaser, is applicable to a case where the purchase is upon the foreclosure of a mortgage prior in record, but subsequent in date.

In Equity.

On July 24, 1878, Knowlton and wife made their promissory note to the order of Anna North for \$700, with interest at the rate of 9 per cent. per annum, with coupons attached, payable at the office of Corbin Banking Company, unpaid interest drawing 10 per cent.; and on failure to pay interest within five days after due, the holder may collect principal and interest at once. The note was secured by first mortgage on lots 1, 2, 3, 4, and 5, and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, section 5, township 121, range 46, situated in Big Stone county, Minnesota. Mortgage was recorded August 3, 1878, in Big Stone county. On April 1, 1880, Knowlton and wife made their note for \$200, payable to W. I. Austin, or order, six months after date, with interest at 10 per cent. per annum, and also made their note for \$200, payable 18 months after date to order of W. I. Austin, at 10 per cent. interest, and secured the two notes for the aggregate sum of \$400 by mortgage on said property covered by first mortgage, which was recorded in the county of Stevens, state of Minnesota, June 20, 1880; and the same mortgage was also recorded in Big Stone county, May 8, 1882. The first mortgage also was recorded in Big Stone county, May 31, 1881. The Austin mortgage was foreclosed under the power of sale by virtue of the statute of the state of Minnesota, and on default the property was sold, April 12, 1882, to C. K. Orton, he being the highest bidder, for the sum of \$513.51, and a certificate given the purchaser by the sheriff. He went into possession, and on April 26, 1883, commenced an action in the state court against North to determine the adverse claim, which was removed to this court and stands

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

for hearing. There were other conveyances from Orton and wife, but the case, by stipulation of counsel and other proceedings, has been freed from any embarrassment on that account. Suit is brought by Anna North to foreclose her mortgage, making Orton a defendant, and the two cases are heard together. No defendant appears but Orton. At the time her mortgage was first recorded, August 3, 1878, Big Stone was an unorganized county, and continued so until February, 1881. It was attached to Stevens county for judicial purposes, and conveyances and mortgages by statute were authorized to be recorded in Stevens county, and until the record of May 31, 1881, her mortgage was not properly recorded so as to give constructive notice of its existence and its contents. Austin's mortgage was properly recorded, and, though later in date, it was prior in record to the North mortgage.

C. J. Berryhill, for Anna North.

L. Emmett, for C. K. Orton.

NELSON, J. The purchaser, Orton, at the foreclosure sale of the Austin mortgage, is entitled to a decree in his favor, if Austin took his mortgage without notice of the North mortgage, actual or constructive, and paid a valuable consideration therefor. Gen. St. Minn. 1878, p. 537, § 21. He cannot claim precedence of title unless the evidence clearly establishes these facts; for it is not disputed that at the time of his purchase the North mortgage was properly recorded, and it is well settled that if the owner of the prior unrecorded mortgage puts it on record before a subsequent purchase of the property, the record would be constructive notice to the purchaser; and this rule applies where the purchase is upon the foreclosure of a mortgage prior in record, but subsequent in date. See 3 Washb. Real Prop. 282-287. It is necessary for North to show that Austin had actual notice or knowledge of facts sufficient to put him upon inquiry to ascertain if there was any incumbrance or lien prior to his mortgage when he took it, and if this is not proved, it is still necessary for Orton to show that Austin paid value for his mortgage. The Austin mortgage contains an erasure of the covenant against incumbrances; it was a printed form containing several other covenants, and none were erased but this. No explanation is given, and it is a fair inference that there was a motive known to Austin for this erasure; at least, Orton should offer some explanation, which he fails to do.

Again, the evidence that Austin paid the \$400 consideration mentioned is not full and satisfactory. Orton is the only witness, and his testimony is brief. He says: "I know what that mortgage was given for; it was given for lumber sold by Austin to Knowlton and put into a house which Knowlton was erecting at that time." It was necessary to prove a consideration actually paid; the recital in the mortgage of such payment is not enough, and this proof is too meager and unsatisfactory. The conclusion is that Orton does not stand in

the situation of a *bona fide* purchaser for a valuable consideration, and has no precedence of title, by virtue of his purchase, to defeat a foreclosure by North.

Decree ordered in favor of North, and a reference to B. F. Shipman, master.

WINDLE v. BONEBRAKE and others.

(Circuit Court, D. Kansas. March 13, 1885.)

VENDOR AND VENDEE—NEGOTIABLE BOND SECURED BY MORTGAGE—ASSIGNMENT—PAYMENT BY PURCHASER—FRAUDULENT SATISFACTION OF RECORD—FORECLOSURE BY ASSIGNEE.

B. and wife executed a negotiable bond to S. for \$500, payable in five years, at the National Bank of Chester County, Pennsylvania, with interest, payable semi-annually at the same place, for which coupons were attached, and to secure payment, executed a mortgage on 160 acres of land in Allen county, Kansas. S. recorded the mortgage, and sold and transferred the bond and mortgage to H., who transferred and sold them to W. Immediately after the execution of the bond and mortgage, and before the assignment of the mortgage was recorded, B. sold and conveyed the land to A. subject to the mortgage, and A. sold and conveyed to L., who sold and conveyed to D. S. S. represented that he was still the owner and holder of the bond and mortgage, and before D. S. accepted a deed from L. he paid S. the amount of the bond, and S. satisfied the mortgage of record. The bond and mortgage were not in the possession of S., nor had he any authority to satisfy the record. W. brought an action to foreclose the mortgage. *Held*, that D. S. took the land subject to the mortgage, and that W. was entitled to foreclose.

In Equity.

E. A. Barber, for plaintiff.

J. H. Richards, for defendant Sheer.

FOSTER, J. The complainant brings his bill in equity, seeking a decree of foreclosure of a mortgage on real estate. On the twenty-seventh of June, 1879, Isaac Bonebrake and wife executed a negotiable bond to one J. W. Stover for \$500, payable in five years, at the National Bank of Chester County, Pennsylvania, with interest, payable semi-annually at the same place, and for which coupons were attached; and to secure the same, executed a mortgage on 160 acres of land in Allen county, Kansas. Stover immediately placed the mortgage on record, and then sold and transferred the bond and mortgage to one David Hurd, who soon thereafter, and on the sixteenth day of August, 1879, sold and transferred them to this plaintiff, who thereby became the *bona fide* holder of the same. Immediately after the execution and delivery of the mortgage, Bonebrake and wife sold and conveyed said real estate to one Boydston, subject to said mortgage, and who in turn sold the land to one Likes, who, on the eighteenth day of August, 1879, sold and conveyed it to defendant David Sheer. At the time Sheer bought the property there was no assignment of the mortgage on record, and Sheer had no knowledge of the transfer and sale of the bond and mortgage, and Stover falsely repre-

sented to Sheer that he (Stover) was still the owner and holder of the same, and had them in his possession, and that he would release the mortgage of record upon Sheer paying the money to him. Relying upon these representations of Stover, they together went to the office of the register of deeds, and Stover then and there satisfied the mortgage of record, and Sheer paid him the money and took a deed for the land. Stover did not have possession of the bond or mortgage, and had no title or interest in them, nor any authority to satisfy the record. The mortgage recited the debt which it was given to secure, and the time and place of payment, (June 27, 1884, at the National Bank of Chester County, Pennsylvania.) The controversy is now between this plaintiff and David Sheer, as to whether the mortgage is a lien on the land as against Sheer's title. When Sheer began negotiations for the land the records disclosed the existence of the mortgage unsatisfied, the debt not due for several years to come, and payable at a bank in Chester county, Pennsylvania, and a negotiable obligation outstanding for which the mortgage was given to secure. Neither Stover nor any one else told Sheer that the debt had been paid; on the contrary, he was told that the debt was not paid, and in this transaction he undertook to pay it off and get the record clear.

It appears to have become the established doctrine that a mortgage given to secure a debt is but an incident to the debt and partakes of its negotiability. *Carpenter v. Longan*, 16 Wall. 271; *Burhans v. Hutcheson*, 25 Kan. 626; *Kellogg v. Smith*, 26 N. Y. 20; *Keohane v. Smith*, 97 Ill. 156. From this rule it would naturally follow that while its negotiable character existed the purchaser would take the security as he does the debt to which it is the incident, free of equities and defenses existing between the original parties. The *bona fide* purchaser, in such case, obtains vested rights to the debt and the security. How far are his rights liable to be divested by reason of the registry laws concerning real estate? Must he put upon the records his assignment of the mortgage, or in default thereof remain in constant danger of the mortgagee, at any time wiping out his security with a stroke of the pen? The statute of this state declares that the recording of an assignment of a mortgage does not of itself impart notice to the mortgagor, so as to invalidate any payment made by him, his heirs or personal representatives, to the mortgagee. Section 3, c. 68, Laws 1879. This statute evidently requires actual notice to the mortgagor of the assignment, to protect the rights of the assignee against payments by the mortgagor to the mortgagee. But the supreme court of Kansas has construed this provision as not applying to mortgages given to secure negotiable paper. *Burhans v. Hutcheson*, 25 Kan. 626. In any event, the grantee of the mortgagor is not included in the terms of the statute, and it may well have been intended that a subsequent purchaser of the real estate should be charged with notice of all the record shows at the time of his purchase. *Jones, Mortg.* § 473; *Belden v. Meeker*, 47 N. Y. 307; *Van Keuren v. Corkins*, 66 N. Y. 77.

In this case the records showed, at the time of Sheer's purchase, an unsatisfied mortgage to secure a negotiable bond, due more than four years hence, and payable in Chester county, Pennsylvania. He was informed that it was not paid off; but Stover, the mortgagee, falsely represented that he was still the owner of it, and that it was in his possession; and relying upon these statements, and without requiring Stover to produce or surrender the note or mortgage, he paid him the amount of the debt, and had satisfaction entered of record. This transaction occurred on the eighteenth day of August, 1879, and but two days after the plaintiff bought the note and mortgage in Pennsylvania, not sufficient time having elapsed to enable plaintiff to have put his assignment on record; and, as a matter of fact, it was not recorded until July, 1881. This bond being negotiable, and the mortgage of record disclosing that fact, as well as the time and place of payment, it was great carelessness on the part of Sheer not to have required the production of the papers, or some evidence that Stover held the same. *Keohane v. Smith*, 97 Ill. 156; *Purdy v. Huntington*, 42 N. Y. 334; *Jones, Mortg.* § 474; *Bank v. Anderson*, 14 Iowa, 545. Had Sheer found the record of the mortgage released and satisfied by the mortgagee, and he had no actual notice of the assignment, or that the debt was unpaid, he might well have relied on the record; and in such a case he would take the land free of incumbrance, although the record may have been released by fraud, accident, or mistake, or merger of titles. *Jones, Mortg.* § 472; *Purdy v. Huntington*, 42 N. Y. 334; *Gillig v. Maass*, 28 N. Y. 191; *Brown v. Blydenburg*, 7 N. Y. 141; *Kellogg v. Smith*, 26 N. Y. 18; *Van Keuren v. Corkins*, 66 N. Y. 77; *Bank v. Anderson*, 14 Iowa, 544; *Vannice v. Bergen*, 16 Iowa, 555; *McClure v. Burris*, Id. 591; *Cornog v. Fuller*, 30 Iowa, 212; *Bowling v. Cook*, 39 Iowa, 200; *Baldwin v. Sager*, 70 Ill. 505; *Ogle v. Turpin*, 102 Ill. 148; *Ayers v. Hays*, 60 Ind. 452; *Etzler v. Evans*, 61 Ind. 56.

This great array of authorities has been examined and cited by reason of a supposed conflict on this question, and there are some cases, I believe, in Michigan and Wisconsin, and a dissenting opinion in *Bank v. Anderson*, *supra*, giving to a mortgage securing a negotiable debt the same protection in the hands of *bona fide* holders as the note itself. But in reason, as well as by the great weight of authority, I think the doctrine before announced is fully established. At the same time it must be kept in mind that the record which will protect the subsequent purchaser is the record as he *finds* it, and not as he *makes* it, or *procures it to be made*. For instance, take the case of *Cornog v. Fuller*, *supra*. The court say: "When Fuller purchased the land he had no notice that the Hall note was unpaid, and in the possession of plaintiff. He saw upon the records the satisfaction of the mortgage," etc. In the case of *Insurance Co. v. Eldredge*, 102 U. S. 545, when the insurance company made its loan the deed of trust to secure the notes held by Eldridge was released.

But the release was procured by the agent of the insurance company, and such record could not avail the company. If this was not the rule it would open wide the door for fraud and carelessness, as a party could take advantage of his own wrongful or careless act. The only case which seems to recognize a different doctrine, I have been able to find, is *Lewis v. Kirk*, 28 Kan. 497; and while the correct rule, as an abstract proposition of law, is stated in that case, I think the court overlooked this distinction, or else they took the finding of the court below, that Kirk was a *bona fide purchaser*, as conclusive, notwithstanding the *status* of the record. The case of *Keohane v. Smith*, *supra*, is directly in point with the case at bar; as also is the case of *Bent v. Stiger*, lately decided by the supreme court of Illinois and not yet reported. The lien of the plaintiff's mortgage must be held superior to Sheer's deed, and a decree entered as prayed in the plaintiff's bills.

BREWER, J., concurring.

McALPINE v. UNION PAC. RY. CO.¹

(Circuit Court, D. Kansas. January 30, 1885.)

1. RAILROAD COMPANIES—CONSOLIDATION—PURCHASE OF LANDS—NOTICE OF EQUITIES.

At the time of the consolidation of the Union Pacific, Kansas Pacific, and Denver Pacific Railway Companies, the consolidated company became invested and possessed of all the rights and privileges and property, real, personal, and mixed, of the constituent companies, subject to all liens, charges, and equities existing thereon, and took the same with full knowledge of those liens, charges, and equities. A contract for the sale of lands standing on the books of the Kansas Pacific Company is sufficient notice to the consolidated company to prevent it from being a *bona fide* purchase without notice. *Whipple v. Union Pac. Ry. Co.* 28 Kan. 474, distinguished.

2. SAME—CONTRACT TO EXCHANGE REAL ESTATE—SPECIFIC PERFORMANCE.

Where officers of a railway company enter into negotiations and contract for an exchange of real estate, and the board of directors of the railway company subsequently authorize the exchange of the lands to be made, and the deed of the company to be properly executed and delivered to the party with whom the contract is made, upon the performance of certain conditions on the part of such party, and such conditions are afterwards complied with and performance of the contract tendered, specific performance will be decreed.

In Equity. Bill for specific performance of contract for exchange of lands. The opinion states the facts.

James W. Mason, Henry Smith, John W. Day, and James A. Troutman, for complainant.

John P. Usher, A. L. Williams, and Charles Monroe, for defendant.

FOSTER, J. The negotiations for an exchange of real estate be-

¹From the Kansas Law Journal.

tween the plaintiff and the officers of the Kansas Pacific Railway Company culminated on the twenty-eighth of June, 1878, in the following order of the board of directors of the company:

"Kansas Pacific Railway Company. Extract from minutes of board of directors:

ST. LOUIS, June 28, 1878.

"Pursuant to call of President:

"Present—Messrs. Perry, Meier, Edgell, Treadway, Edgerton, and President Carr. The president presented a form of deed to Maria W. McAlpine, to 25½ acres of land in Wyandotte county, in exchange for 2 70-100 (2.70?) acres of land at the landing, in Wyandotte county, and asked for instructions in regard to signing the same. On motion of Mr. Meier, and seconded by Mr. Perry, it was resolved that the exchange of said lands be made, reserving the right of way therein, and the deed of the company be properly executed and delivered to Maria W. McAlpine, whenever the land to be conveyed by her has been released from the tax claim thereon, and a proper deed made for the same is delivered."

In my opinion this record of the board of directors measures and fixes the limits of the liability and obligation of the railroad company in this case. It authorizes the deed of the company for the 25½ acres of land to be delivered to McAlpine, whenever the land to be conveyed by her has been released from the tax claim thereon, and a proper deed made for the same. It does not appear that McAlpine in terms accepted this proposition, but from the evidence and the action of the parties I think an acceptance may be fairly implied. In a conversation with Mr. Devereaux, the attorney of the company, McAlpine expressed the opinion that the best way for him to remove the tax claim would be to buy in the land at the ensuing tax sale, under the new law, which he subsequently did at an expense of several hundred dollars, and directly thereafter tendered performance of the contract. The company in the mean time remained in the quiet use and occupation of the ferry tract, (the title to which, subject to a disputed tax claim, was vested in Maria W. McAlpine.) I think, from the evidence in the case, this removal of the tax claim was made by plaintiff because of the requirement of the company, and may be regarded as part performance of the contract. At the time of making this contract the Kansas Pacific Railway was in the hands of receivers, but their rights were merely temporary possessory rights, the title of the property remaining in the company, and at the termination of the receivership I presume the possession was restored to the company. Lewis and Burnham, as trustees, held a mortgage on this 25½ acres, which the parties agreed was to be released, and the deed which Mr. Carr, the president, presented to the directors, was transmitted to him with such release by Mr. Devereaux, and I think a fair construction of that order is that McAlpine was to have a clear title to the land.

In May, 1879, a consolidated mortgage, as it is called, was made by the Kansas Pacific Company to Gould and Sage, as trustees, cov-

ering the 25½ acres, and in January, 1880, the consolidation of the Union Pacific, Kansas Pacific, and Denver Pacific Railways was made, and together formed the defendant company. Of course the rights of Gould and Sage cannot be adjudicated in this case, as they are not parties; but it does appear that at the time of making said mortgage this order of June 28, 1878, was a matter of record on the books of the company, and unrevoked. McAlpine had got possession, rightfully or wrongfully, of the 25½ acres, and the company was in the use of the ferry tract. Under this state of facts, it is claimed by plaintiffs that Gould and Sage took with notice of their claim.

The Kansas Pacific Company is not made a party to this suit, and, assuming this to be a valid and subsisting contract as to the 25½ acres, what are the liabilities of the defendant company in this matter? To determine that question we will have to refer to the articles of consolidation. In article 8 each constituent company assigns and transfers to the consolidated company all its rights, privileges, property, real, personal, and mixed, all claims, demands, choses in action, and all property of every name and nature, etc., to be held, owned, and controlled by said consolidated company, as fully and completely as the respective parties hereto can own, hold, use, or control the same. Then it adds: "This assignment, transfer, sale, and conveyance is made to said consolidated corporation, subject to all liens, charges, and equities pertaining thereto."

Now it must be admitted that this land passed to the defendant company under this article. It is also true that all rights of the Kansas Pacific Company in this contract with McAlpine passed to the consolidated company, and it could demand of plaintiffs a performance thereof. And it seems to me it is equally apparent that defendant company does not stand as a *bona fide* purchaser without notice. With this land passed, also, to the defendant company all the rights and equities of the Kansas Pacific Company in this contract, and the right to receive the deed for the ferry tract in exchange for the 25½ acres. The whole and entire right, title, and interest, and equities of the Kansas Pacific Company in and about these lands, and the right of action, passed to the defendant company. Can the defendant claim and receive the benefits of the contract, the full consideration, and repudiate the burdens and obligations attending it? I think not. Wat. Spec. Perf. § 512. This is quite a different case from *Whipple v. Union Pac. Ry. Co.* 28 Kan. 474. In that case it was sought by Whipple to charge the defendant company with a general judgment for unliquidated damages for a personal injury incurred before consolidation, and while the Kansas Pacific Company was operating the road.

This case is a contract appertaining to specific real estate transferred by the articles of consolidation to the new company, and while the first clause of article 10 exempts the new company from liability for outstanding debts, obligations, and liabilities of the constituent companies, the next clause reads as follows: "But nothing herein con-

tained shall prevent any valid debt, obligation, or liability of either constituent company from being enforced against the property of the proper constituent company, which by force of these articles becomes the property of the consolidated company." This clause expressly authorizes the enforcement of obligations and liabilities against the property of the constituent companies, which passes under the consolidation to the new company. Of course there can be no decree or money judgment rendered against the defendant company for the other land, but the plaintiff, Mrs. McAlpine, is entitled to a conveyance of the 25½ acres; and, inasmuch as she declares herself satisfied with a conveyance with usual covenants for quiet possession, I see no objection to granting such decree. *Reese v. Hoeckel*, 58 Cal. 281; *Wat. Spec. Perf.* § 424; *Wallace v. McLaughlin*, 57 Ill. 53. And it is so ordered.

D. M. OSBORNE & Co. v. BRYCE and others.

(Circuit Court, E. D. Wisconsin. February 3, 1885.)

1. PROMISSORY NOTES—ACTION AGAINST GUARANTOR—SALE OF MACHINES—DEFENSE OF BREACH OF WARRANTY.

A breach of warranty by the principal in a transaction cannot be set up by a guarantor when sued on his contract of guaranty.

2. SAME—COUNTER-CLAIM—FAILURE OF CONSIDERATION FOR ORIGINAL CONTRACT.

A mere counter-claim growing out of a breach of warranty is not available to a guarantor or surety, whether he be an indorser for value or merely an accommodation indorser; but if there is any fact from which a total failure of consideration for the original contract arises, the guarantor or surety has a right to avail himself of that fact.

At Law.

G. D. Emery and Chapin, Dey & Friend, for plaintiff.

Charles B. Pratt and W. C. Williams, for defendants.

DYER, J. This is a suit at law upon money demands, brought by the plaintiff corporation, a citizen of New York, against the defendants, Charles H. Sproat, Samuel G. Ormiston, and John Bryce, as co-partners under the firm name of Sproat, Ormiston & Co. It is alleged that Sproat is a citizen of Minnesota, that Ormiston is a citizen of Dakota, and that Bryce is a citizen of Wisconsin. Only the last-named defendant has been served with process, and appears in the action. The complaint contains 24 causes of action. In the first cause of action it is alleged that at a time and place in the territory of Dakota, particularly stated, one Foley executed his promissory note, whereby he promised to pay to the order of the plaintiff, on a day named, a certain sum of money, with interest; that as part of the same transaction the defendants jointly and severally, by their firm name, for value received, duly indorsed and guarantied the payment

of said note to the plaintiff, at maturity, and waived demand, protest, and notice of non-payment thereof; that this indorsement, guaranty, and waiver was as follows: "For value received, I (or we) hereby guaranty the payment of the within note at maturity, or any time thereafter, and waive demand, protest, and notice of non-payment thereof. [Signed] SPROAT, ORMISTON & Co." It is further alleged that thereupon, in good faith, and for a valuable and sufficient consideration, the note and guaranty were delivered to the plaintiff, who became the owner and holder thereof. Demand of payment, and refusal to pay by the defendants, is then alleged. All the other causes of action are similar to the first, except that promissory notes of different dates and amounts, by different makers, and payable at different times, are therein set forth, the defendants being charged as guarantors upon all the notes. Copies of the notes are annexed to the pleadings, which show that the terms of those obligations, and the guaranty on the back of each, correspond with the allegations of the complaint.

The aggregate amount of the notes is \$2,736.35, for which amount, with interest, judgment is demanded against the defendants. The answer of the defendant Bryce admits the citizenship of the defendants as alleged in the complaint, and their copartnership at the several times therein stated. To the first cause of action he then sets up the following affirmative defense: That on the fourth day of December, 1880, Sproat, Ormiston & Co. entered into a written contract with the plaintiff, by the terms of which they became the agents of the plaintiff to sell certain machinery mentioned therein; that the note mentioned in the first cause of action was executed by the maker thereof, Foley, at the time and place, and for the amount stated in the complaint; that this note, at the time it was executed, and before guaranty of payment by Sproat, Ormiston & Co., and before delivery of the same to the plaintiff, was the property of the plaintiff, and the guaranty was made after the note thus became the plaintiff's property, and not at the request of the maker, or for his benefit, but that it was made at the request of the plaintiff, and in accordance with the terms of the contract between the plaintiff and Sproat, Ormiston & Co., and without any other consideration than that stated in the answer; that the maker of the note, at the time of its execution and delivery, was pecuniarily responsible; that the note was taken by Sproat, Ormiston & Co. for and in behalf of the plaintiff, and for its benefit; that no notice has been given the defendant Bryce by the plaintiff that the maker of the note was not, at the time it was executed and delivered, pecuniarily responsible, or that the note was bad or hard to collect, as, by the terms of the contract referred to, it is alleged the plaintiff was bound to do if such were the facts; that the note was given as part consideration for a harvester sold by the plaintiff to Foley; that the plaintiff warranted to Foley that the harvester was well built, of good material, and capable of cutting, if properly

managed, from 10 to 15 acres per day; and that Foley was thereby induced to purchase the machine. The breach of this warranty is then charged, and it is alleged that the guaranty of Sproat, Ormiston & Co. was made and based upon this warranty, as per the terms of said contract, and upon no other consideration, and that the guaranty would not have been given had not the plaintiff so warranted the machine sold to Foley.

The same defense is interposed to each of the several causes of action, the defenses differing only with respect to the names of the makers of the different notes guarantied by Sproat, Ormiston & Co.; and upon the defenses so alleged, the defendant Bryce demands judgment that the plaintiff take nothing by its suit. The plaintiff now moves for judgment against the defendant Bryce upon the pleadings; the general ground of the motion being that the answer sets up no valid defenses to the plaintiff's demands, and by stipulation between the parties the court is now to pass upon this motion.

The motion, in the form in which it is made and submitted, seems to be equivalent to a demurrer to the answer, and the principal question argued is whether it is competent for the defendant Bryce to set up as a defense to the action a breach of the warranty given by the plaintiff to the purchasers of machines. The determination of the question thus presented appears largely to depend upon the construction to be given to the contract entered into between the plaintiff and Sproat, Ormiston & Co. The contention of the defendant is that Sproat, Ormiston & Co. had already by their contract, in legal effect at least, guarantied or become liable for the payment of the purchase price of the machines; that it was not necessary to guaranty payment of the notes; that the machines were in the outset sold conditionally to Sproat, Ormiston & Co.; that the defendants became liable therefor under the contract; that, therefore, the warranty given by the plaintiff to purchasers of machines inured to the benefit of Sproat, Ormiston & Co.; and that the consideration for the guaranty of the notes was the plaintiff's warranty of the machines. It is true that the contract, in its preliminary recitals, states that the parties have bargained for the conditional sale of the machines to Sproat, Ormiston & Co.; but, looking at the contract in its entirety, it seems evident that what the parties contemplated was a sale of the machines as the property of the plaintiff, by Sproat, Ormiston & Co., as the plaintiff's agents, to third parties, with an obligation on the part of Sproat, Ormiston & Co. to account for the proceeds in the manner prescribed, and with a reserved right in the plaintiff, in certain contingencies, to make Sproat, Ormiston & Co. their absolute debtors for the machines. Many of the important provisions of the contract contain language expressive of the relation of principal and agent. If, by virtue of the contract, a sale outright of the machines to Sproat, Ormiston & Co. was intended, or if there was thereby created an absolute liability to pay for all machines furnished, many of the pro-

visions of the contract would seem to be superfluous and quite meaningless. The defendants were to receive the machines under the contract at certain retail prices, less a certain discount for commissions. They were not to sell or become interested in the sale of any mowing and reaping or self-binding machines other than those manufactured by the plaintiff. Their agreement was, as we find it expressed in the contract, to make all reasonable efforts to sell the machines to responsible persons only, and only within certain territory; and this agreement, which also includes an obligation with reference to advertising machines and canvassing territory, supports the view that an agency was established. And in case of violation of these stipulations it was declared, in effect, that Sproat, Ormiston & Co. were to be liable for machines at their full retail price, without any discount or commission.

The defendants also contracted to make prompt settlement with purchasers of machines upon delivery of the same, and to see that all machines sold were properly set up and operated; that all machines received from the plaintiff should be sold either for cash, or good and approved notes, or for part cash and part good notes. And it was expressly stipulated that all such machines should be and remain the property of the plaintiff until so sold or otherwise settled for, as provided in the contract, and that, when sold for cash, either in whole or in part, the moneys received, to the amount of the price for said machines, should be received by Sproat, Ormiston & Co. as the moneys of the plaintiff, and be transmitted to the plaintiff without delay; that when not wholly paid for in cash, a note of the form prescribed by the plaintiff should be taken for the unpaid balance, signed by the purchaser, and payable to the order of the plaintiff, and that the same should be indorsed, and the payment thereof guaranteed by Sproat, Ormiston & Co., waiving demand, protest, and notice of non-payment; that all such notes should become and be the property of the plaintiff immediately when executed, and be transmitted to the plaintiff without delay; such notes to bear 10 per cent. interest from the date of the sale or delivery of the machine for which they were given. It was also provided by the contract that for the purpose of ascertaining the responsibility of makers of notes given in payment of machines under the contract, an agent of the plaintiff should have the privilege of submitting the same to a cashier of a bank, or some other responsible person acquainted with the general pecuniary standing and responsibility of the people of the neighborhood, and that any of such notes which he should pronounce bad, or hard to collect of the makers thereof, might be returned to Sproat, Ormiston & Co., who should give cash or other notes therefor, which notes such cashier, or other responsible person, should pronounce good and collectible. Embodied in the contract is the form of a warranty which was to be given to purchasers on sales of machines. This warranty is as follows:

"All our machines are warranted to be well built, of good material, and capable of cutting, if properly managed, from ten to fifteen acres per day. If, on starting the machine, it should in any way prove defective and not work well, the purchaser shall give prompt notice to the agent of whom he purchased it, and allow time for a person to be sent to put it in order. If it cannot then be made to do good work, the defective part will be replaced, or the machine taken back and the payment of money or notes returned. Keeping the machine during harvest, whether kept in use or not, without giving notice as above, shall be deemed conclusive evidence that the machine fills the warranty."

Another provision of the contract was this: that in case any of the machines should remain unsold at a time specified, it should be optional with the plaintiff then or at any time thereafter to receive them back, or to require payment therefor by Sproat, Ormiston & Co. at the price specified in the contract, less the discount, with interest, or to require a renewal of the contract for such machines by Sproat, Ormiston & Co.; and in case the plaintiff should elect to receive back such unsold machines, then Sproat, Ormiston & Co. agreed to store the machines without charge until a certain time, and pay all local taxes that might be assessed upon them, and to deliver them at any time required, at any convenient railroad depot, free of all back freight or charge for storage or handling; and it was also agreed either to renew the contract or make a new one with the plaintiff upon certain terms; in either case such contract to cover such unsold machines. Or, in case the plaintiff should elect to receive back any of such machines, then Sproat, Ormiston & Co. agreed to settle and pay for them, and give their notes for the amount thereof, payable at specified times, with interest.

There was also a clause in the contract by virtue of which the plaintiff reserved the right to revoke the contract at any time upon the happening of certain contingencies, and that immediately upon such revocation all the machines previously delivered to Sproat, Ormiston & Co., and remaining unsold, should be deemed to be in the possession of the plaintiff, without any claim thereon by Sproat, Ormiston & Co.; and that any sales made, changing the conditions, prices, terms of sale or warranty, as provided in the contract, should be made at the risk, responsibility, and cost of Sproat, Ormiston & Co.

Thus it will be seen that under certain circumstances occurring in the prosecution of the business, or upon the happening of certain contingencies, the plaintiff was to have and did have the right to treat Sproat, Ormiston & Co. as its absolute debtors for machines furnished them and remaining unsold. Still, it was evidently contemplated that all machines sold should be disposed of as the property of the plaintiff, and that all notes taken and moneys received on account of sales should also be the property of the plaintiff in its absolute right. And the court does not see how the conclusion is to be avoided, that in the sale of machines, Sproat, Ormiston & Co. were acting as the plaintiff's agents or representatives, not themselves holding the title

to the machines, but liable as such agents to account for the proceeds of sales. It does not follow that because in certain contingencies the plaintiff had the right or option under the contract to hold Sproat, Ormiston & Co. liable for the machines, they are to be regarded as chargeable in the first instance, and in any event, with the retail price of the machines. If the parties dealt with the machines sold as the property of the plaintiff, it may well be assumed that the relation between them as to such machines was that of principal and agent, and that they understood and intended that the plaintiff was to look for payment to the maker of the note and the subsequent guarantors, either or both. Then, as the court understands the pleadings and the contract, (a copy of which is annexed to the answer,) Sproat, Ormiston & Co. sold the machines in question to the various makers of the notes in suit as the property of the plaintiff, and in behalf of the plaintiff executed to such purchasers the warranty which the contract required to be given in each case of sale. This warranty was the obligation of the plaintiff. From the allegations of the answer it is evident that the remedy which the purchasers of machines would have if there was a breach of the warranty, would be one against the plaintiff, and not against Sproat, Ormiston & Co.

The question, therefore, is, does a breach of this warranty alone constitute a defense to this suit against Sproat, Ormiston & Co. upon their contract of guaranty, by virtue of which they guaranteed the payment of the notes received on the sale of the machines? The court is of the opinion that it does not. The breach of warranty, if shown, would not give the defendants a right of action against the plaintiff, nor necessarily cause them any damage. The makers of the notes might have a right of action against the plaintiff for damages sustained by them in consequence of the breach, or they might set off or recoup their damages in a suit against them upon the notes. There is no averment in the answer that Sproat, Ormiston & Co., or the defendant Bryce, have sustained any injury on account of the alleged failure of the machines to answer the requirements of the warranty. There is no allegation that the makers of the notes have sought to enforce any remedy against the defendants, or that they are under any liability to such makers on account of the alleged breach of warranty. Until some injury, actual or threatened, has resulted to the defendants from some claim made against them by the makers of the notes, how can it be said that they can avail themselves of the defense here interposed, in an action wherein their liability to the plaintiff as guarantors of the notes is sought to be enforced? The makers of the notes can, I think, alone elect to set up the defense of breach of warranty given on the sale of the machines, and they are not parties to this action. The defense is one not arising out of the defendants' contract of guaranty. The liability of the plaintiff, if any, resulting from a breach of their warranty, is one wholly in favor of the purchasers of the machines. It is hardly correct to say that the consideration

for the guaranty of the notes by the defendants was the plaintiff's warranty of the machines.

Looking at the contract in question from its four corners, so to speak, the consideration for the guaranty consisted, among other things, of the benefits and profits which Sproat, Ormiston & Co. were to realize from sales of the plaintiff's machines, and from the relation in which they stood to the plaintiff as its representatives, having, by virtue of the contract, the right to engage in the business of selling machines for the plaintiff. They chose to agree that they would guaranty the payment of all notes taken for machines which were not sold for cash. By guarantying the notes in suit they complied with that obligation of their contract. No damage or injury has resulted to them, so far as here appears, from the alleged breach of the warranty which the plaintiff gave to purchasers of machines. And the court does not perceive that there is any substantial distinction between this case and cases cited on the argument, wherein it has been held that a breach of warranty by the principal in a transaction cannot be set up by a guarantor when sued on his contract of guaranty. *Gillespie v. Torrance*, 25 N. Y. 306; *Lasher v. Williamson*, 55 N. Y. 619; *Henry v. Daley*, 17 Hun, 210; *Hiner v. Newton*, 30 Wis. 640. It is true that these were cases where indorsers, for the accommodation of the makers of notes, or the surety of the makers, sought to avail themselves, in a suit by the payee, of a breach of warranty by way of defense, recoupment, or counter-claim; but the principle governing the determination of those claims seems to be applicable to the case at bar. The defenses here interposed do not arise upon a failure of the consideration of the contract on which the plaintiff's action is founded. They are rather to be regarded as the setting off of distinct causes of action, one against the other. The non-performance of the plaintiff's engagement to the makers of the notes is not to be regarded as a failure of consideration, but as an independent cause of action which the makers of the notes, and they only, may assert. It is in their election to determine whether it shall be used defensively, or whether they will bring their own actions for the damages, or whether they will forego their claims altogether. The defendants have no control over them in this respect, and cannot borrow, or avail themselves of their right. *Lasher v. Williamson*, *supra*.

Of course it will be understood that these observations are made upon the state of facts disclosed in the pleadings before the court. In *McDonald Manuf'g Co. v. Moran*, 52 Wis. 203, S. C. 8 N. W. Rep. 864, it was held that, in an action against an accommodation indorser of promissory notes, the facts that the notes were given for a machine warranted to answer certain purposes, but which proved on trial to be absolutely worthless for such purposes, that the plaintiff took the notes with notice of the warranty and of the breach thereof, and after the maturity of the notes, and that the principal maker was utterly insolvent,—entitled the indorser to be subrogated to the rights which

the maker would have in such a suit against him. But such a state of facts does not appear in the case in judgment.

Aultman v. Thompson, 19 FEB. REP. 490, was cited by counsel for the defendants on the argument. The opinion of the court in that case does not disclose the facts developed at the trial upon which the ruling was made, and it is not by any means clear from the opinion that the question here presented was there either discussed or determined. Since the submission of the present motion, the record in that case has been furnished by counsel for the defendant, from which it appears that the suit was one against the defendant as guarantor of certain notes executed by one Valentine for machines sold to Valentine through the defendant, who was Aultman & Co.'s agent under a certain contract between the parties. There, as here, was a warranty of the machines by Aultman & Co. to the purchaser. And, among other defenses interposed, a breach of warranty was alleged. Further, that Aultman & Co. attempted by certain changes to make the machines fulfill the warranty, but failed; and that thereupon the purchaser, Valentine, rescinded the contract and tendered back the machines to Aultman & Co., and notified them that he elected to so rescind the contract and return the machines. It was further alleged by way of defense that the defendant's guaranty was made without any knowledge of the warranties of the machines; that the changes in the machines, in order to make them fulfill the requirements of the warranties, were made without the defendant's knowledge; that they were wholly worthless, and therefore that there was a total failure of consideration for the guaranty. Thus it will be seen that the defense in that case was not merely breach of warranty and counter-claim arising therefrom, but a rescission of the contract by the purchaser of the machines, founded upon a breach of warranty which was incorporated in the purchaser's notes, and the total failure of consideration for the guaranty.

Such a defense, as I understand the case, was held admissible by the court. In the case at bar the defense is not based upon any rescission of the contract of purchase by the purchaser of the machines and a failure of consideration, but upon a mere counter-claim arising out of an alleged breach of warranty. No rescission of the contract of purchase is here set up, and I understand the rule to be, under the authorities, that a mere counter-claim, growing out of a breach of warranty, is not available to a guarantor or surety, whether he be an indorser for value or merely an accommodation indorser; but that if there is any fact from which a total failure of consideration for the original contract arises, the guarantor or surety has a right to avail himself of that fact. In the case cited the machines failed to meet the terms of the sale, and were, in fact, returned by the purchaser. And in some of the defenses to that action it was also alleged that the purchaser of the machines was wholly insolvent. So that the case would appear to stand upon the same footing as *McDonald*

Manuy'g Co. v. Moran, supra. For the reasons stated I am of the opinion that *Aultman v. Thompson* is not a controlling authority upon the question here in judgment. The facts in the two cases, and the character of the defenses as disclosed by the record, are materially dissimilar.

Upon the argument of the plaintiff's motion for judgment some other points affecting the sufficiency of the defendant's answer were made, but they were points which, if ruled against the pleading, would still leave it amendable; and counsel were understood to unite in a request for the judgment of the court upon the principal question, namely: Whether the defendants, as guarantors of the notes in suit, could defend this action on the ground alone of a breach of the contract of warranty made between the plaintiff and the purchasers of the machines. Upon that question the court entertains the views which have been expressed, and, unless the difficulties that have been suggested in the way of setting up the defenses here interposed can be remedied by amendment of the answer, the court is of the opinion that these defenses are unavailing against the application for judgment.

PRESTON and others v. CANADIAN BANK OF COMMERCE.

(District Court, N. D. Illinois. December Term, 1883.)

BANKS AND BANKING—CLEARING-HOUSE—PAYMENT UNDER MISTAKE.

C. deposited certain collaterals with P., K. & Co., bankers and members of the Chicago Clearing-house, with the understanding that he should have a right to draw checks on them to within 10 per cent. of the value of the securities. On August 5, 1881, C. drew his check for \$4,000, which was deposited with the defendant bank, also a member of the clearing-house, to his credit, and went into the exchanges for collection through the clearing-house on the morning of August 6th. Under the rules of the clearing-house each member was required to pay its balances to the clearing-house by 12 o'clock, and any check which was found not to be good when returned from the clearing-house to the bank against which it was drawn, was to be returned to the bank which collected it through the clearing-house by half past 1 o'clock of the same day. When C.'s check came from the clearing-house into P., K. & Co.'s bank, his account was examined and the collaterals deemed sufficient to pay that check and others drawn on them by him, and they were handed over to the book-keeper to be charged into his account. At 42 minutes past 1, P., K. & Co. heard that C. had failed, when a second examination was had and it was found that a mistake had been made, whereupon the check was sent to defendant bank and payment demanded at 15 minutes before 2 o'clock and refused. P., K. & Co. brought suit against defendant to recover the amount of the check as money paid under mistake. *Held*, that they were not entitled to recover; distinguishing *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281.

At Law.

J. P. Wilson, for plaintiffs.

W. H. Swift, for defendant.

BLONGETT, J. This is an action in *assumpsit* to recover the amount of a check drawn on the plaintiffs by Gardner P. Comstock, August

5, 1881, for the sum of \$4,000, deposited with the defendant, the Canadian Bank of Commerce, by Comstock to his credit, and paid by the plaintiffs to the clearing-house, as plaintiffs claim, by mistake as to the condition of Comstock's account.

The main facts in the case, which I deem material for the purpose of disposing of the question, are briefly these:

Both the firm of Preston, Kean & Co. and the Canadian Bank of Commerce were members of the Chicago Clearing-house at the time this check was drawn and paid. Gardner P. Comstock carried on business in the city of Chicago under the name of G. P. Comstock & Co., and had an account both with the defendant bank and the banking firm of Preston, Kean & Co. So far as the proof shows, the account with the defendant was an ordinary deposit account for whatever money was deposited in the due course of Comstock's business with the defendant as Comstock's banker. The account that Comstock kept with the plaintiffs, Preston, Kean & Co., was not strictly a deposit account, but was an arrangement for credit; that is, Comstock left with the firm of Preston, Kean & Co. warehouse receipts for grain and provisions, and against these pledges of collaterals it was understood that Comstock should have a right to draw checks to the extent of the market value of the articles represented by these securities; that is, the agreement was that they were to pay his checks to within 10 per cent. of the value of the securities deposited with them. On August 5, 1881, Comstock drew his check on the plaintiffs for \$4,000, which was deposited with the defendant bank to the credit of Comstock, and went into the exchanges for collection through the clearing-house on the morning of August 6th. By the rules of the clearing-house each member must pay its balances to the clearing-house, whatever they are, by 12 o'clock of that day, and any check which is not found to be good, when returned from the clearing-house to the bank against which it is drawn, must be returned to the bank which collected it, through the clearing-house, by half past 1 o'clock of the same day. The checks usually come into the banks from the clearing-house at from 11 to half past 11 o'clock each day, and the check in question came to the banking-house of the plaintiffs about half past 11. When the checks from the clearing-house on the day in question came into the plaintiffs' bank they were looked over by the cashier and assistant cashier, and passed upon as soon as they could be in the due course of business, and before half past 1 o'clock this check and the collaterals deposited with Comstock had been examined, and the collaterals deemed sufficient to justify the payment of the check in question, together with five other checks drawn by Comstock on the plaintiffs, amounting in all to about \$13,000, and they were handed over to the book-keeper to be charged up to Comstock's account. At about 42 minutes past 1 o'clock information came to the plaintiffs' bank that Comstock had failed to make good his margins on the board of trade, and the cashier directed the assistant cash-

ier to look over Comstock's collaterals again. The assistant cashier testifies that he re-examined the collaterals at once and found that he had made a mistake the first time, and that the collaterals in hand were not sufficient to meet the checks which had been drawn. He at once sent a messenger with the check in question to the defendant bank, and, as the proof shows without dispute, it was presented to the defendant and payment demanded at 15 minutes before o'clock, which payment was refused. At the same time another of Comstock's checks for about \$4,500, which had come in to the clearing-house from the Commercial National Bank, was also returned to that bank.

The plaintiffs seem to rest their right of action solely on the principle that this is money paid by reason of a mistake in the first examination of Comstock's account by their cashier; that they would have returned the check to the defendant before half past 1 o'clock, if their cashier had not, from the examination he first made of Comstock's collaterals, concluded them sufficient to justify them in paying; but the cashier states that on making a second computation of the value and amount of collaterals held by them, he found that he had counted one item twice and thereby made the amount too large.

The authority mainly relied on by the plaintiffs, aside from the general proposition that money paid by mistake may be recovered back, is the case of *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281. That was a clearing-house case, and like this in many important particulars. The rule in the Boston Clearing-house required that checks which were found not good should be returned by a certain hour of the day on which they were received from the clearing-house; but, in that case, the plaintiff bank attempted in apt time to comply with the rule, sent its messenger to the defendant bank with the check, and, the messenger mistaking the directions, went to the wrong bank, and by reason of being obliged to return for more explicit directions, was a few minutes late in the presentation of the check at the defendant bank, and the court held that, under the circumstances, this was money paid by mistake.

The rule of the Chicago Clearing-house is found in section 9 of the constitution of that body, and is as follows: "All checks received in the morning exchanges not found good are to be returned the same day received, before one and a half p. m., to the member from whom received, who shall immediately reimburse the holder of the same." Section 11 of the constitution of the clearing-house also contains the following clause: "These articles of association shall be approved by the respective banks or bankers becoming members, and from that day shall become operative and binding."

There is no doubt of the general principle that money paid under a mistake of fact may be recovered back; but it is equally true and equally a fundamental proposition of law that parties who are competent to make a contract may agree within what time they may correct mistakes, if they are made. Every one at all familiar with bank-

ing business knows that in the dispatch and haste, or apparent haste, with which large sums of money and complicated accounts are handled and business transacted during banking hours, mistakes are liable to occur; and the rapidity with which the different accounts are adjusted at the clearing-house is such as to make it possible, if not probable, that mistakes will occur; and it is therefore entirely competent for parties who are dealing with each other through an agency like the Chicago Clearing-house to make an agreement as to the time within which such mistakes shall be rectified. I cannot construe this rule of the Chicago Clearing-house as anything else than an agreement that checks shall be returned by half past 1 o'clock to the bank from which they come, when they are found not good; that is, it is a contract stipulation to that purport and effect between the members of the clearing-house. Now the question is, shall a mistake made by the bank against whom a check was drawn be allowed to abrogate that rule?

It seems to me that the Boston case has gone to the very verge of the application of the rule that money voluntarily paid under a mistake can be recovered back; and it is noticeable that the next succeeding case in the volume of Massachusetts Reports in which the case relied upon by the plaintiffs is reported, was where a bank sued to recover on the ground they had paid a check by reason of having made a mistake of fact as to the amount to the credit of the drawer, and the court held that no such recovery could be allowed, because it was laches to make such a mistake of fact.

If parties competent to contract within what time they may correct mistakes in their dealings with each other have so contracted, it seems to me the courts have no right to override or disregard such an agreement. If a mistake which is discovered within an hour, or within 10 minutes, after the expiration of the time limited by the agreement for its correction may be corrected, I can see no reason why it cannot be corrected a week afterwards, or whenever it is discovered. The Massachusetts court puts its decision on the ground that you may correct a mistake of this kind at any time after it is discovered, if it places the party to whom the check is returned in no worse condition than it would have been if it had been returned within the stipulated time; thus overlooking the rule that parties may agree that they shall not have the right to correct mistakes unless done within a limited time.

The issues are found for defendant.

HAYES v. BICKELHOUP.

(Circuit Court, S. D. New York. March 7, 1885.)

1. PATENTS FOR INVENTIONS—SKY-LIGHTS AND VENTILATORS—INFRINGEMENT.

Held, on rehearing, that claims 2 and 3 of reissued patent No. 8,688, and claim 3 of 8,689, are valid, and have been infringed by defendant. S. C. 21 FED. REP. 567.

2. SAME—COSTS.

Held, further, that as complainant prevails, on account of a disclaimer filed since suit brought, and fails as to a large part of his case, he is not entitled to costs.

In Equity.

Livingston Gifford, for orator.

Arthur v. Briesen, for defendant.

WHEELER, J. This cause has been before heard and considered. *Hayes v. Bickelhaupt*, 21 FED. REP. 567. A rehearing has been granted and had as to the second claim of reissue 8,675, the second and third claims of 8,688, and the second and third claims of 8,689, on account of mistake of models of patent for those relied upon to show infringement, and of error in reference to former decisions upon the same patents. It was said by Judge BENEDICT, in *Hayes v. Seton*, 12 FED. REP. 120, that the second claim of 8,675 appeared to be for the same invention described in the original patent. He states no comparison of this claim of the reissue with those of the original. Its basis must be the first claim of the original. That is for an arrangement and this for a combination of parts. There are parts in each not mentioned in the other. They may be said to appear to be the same, by considering the parts specified in the claim of the reissue, and not mentioned in the claim of the original, as implied from the specification of the original into the claim, by the words, "as specified," in the claim. What is said there as to infringement of this claim indicates this construction. A moulding secured by rivets, bolts, etc., to form a brace, is one of the elements of the combination of the reissue not specified as such in the arrangement of the original. The alleged infringement did not have that, and it was held not to be an infringement. The alleged infringement here does not appear to have that, and does not appear to be an infringement. Construed to cover the infringement, the reissue would depart from the original, and constructed to follow the original it does not appear to be infringed.

Claim 2 of 8,688 appears to be identical with claim 1 of the original, and has once been held valid, in view of the alleged anticipating devices. *Hayes v. Bockel*, 11 FED. REP. 87. It was held not to be infringed because the gutters were not under cover of the bases which supported the glass in *Hayes v. Seton*, *supra*, and *Hayes v. Dayton*, 20 FED. REP. 690. Here the alleged infringement has the

gutters under those bases where they will not obstruct the light of themselves according to the patent. Following these prior decisions, this claim is held by the court now to be valid and to be infringed. The disclaimer reduces claim 3 of 8,688 to the same as that of the original. Question is made about the propriety of the disclaimer now. It is in the case. No motion has been made to suppress it, nor for leave to take testimony to meet it. It is said that the bill should have been amended to make it admissible, or to adapt the case to it; but that does not appear to be necessary. The claim before the disclaimer was for alternatives, and the disclaimer dispenses with one of them. A bill that would cover both would cover the one left. The claim as it was in the original, and now is, is for a clip of sheet-metal for supporting the ends of abutting glasses in a sky-light by being bent to form a groove for the upper edge of the lower glass, a rabbet to support the lower edge of the upper glass, and a gutter for water from the inner surface of the upper glass. A prior patent to the plaintiff is relied upon as an anticipation, but it does not meet this clip. This claim appears to be valid. The principal point in respect to infringement is made upon the fact that the defendant's clip is made of two pieces of sheet-metal bent so as to join and form the clip, while the patent describes only piece of sheet-metal bent so as to form the clip. This difference does not, however, seem to be material. It pertains to the workmanship rather than to the structure, and when the two things are done they amount to the same thing. The defendant does not have the covering strips of claim 2 of 8,689, arranged to straddle the posts, as specified in the patent, and consequently does not infringe that claim. Claim 3 of that patent appears to stand, in respect to validity and infringement, as at the former hearing.

It is urged that infringement has not been properly proved because no expert has been called to show and explain how the defendant's structures infringe the different claims of the patents, and many cases in which it is held that infringement must be proved have been cited. There can be no question but that infringement, if not admitted, must be proved by competent evidence. There does not appear to be any prescribed method of proof by experts, however. Explanations of matters not commonly or readily understood may be necessary, but when it is proved that the defendant has done what is plainly an infringement, further proof to establish the fact would not seem to be necessary. It is urged that the bill should be dismissed because it set forth that all the claims of all the patents were infringed in one structure to avoid multifariousness, and that this was denied in the answer and shown to be untrue by the proofs. But all the claims held to be valid and to be infringed are infringed by one structure, the Sherwood studio building, therefore this position is not tenable. The orator appears to be entitled to a decree that claims 2 and 3 of 8,688, and claim 3 of 8,689, are valid and have been infringed by the defendant, but not to costs, because he prevails on account of a dis-

claimer filed since the suit was brought, and also because he fails as to a large part of his case.

Let there be a decree for the orator for an injunction and an account, without costs, accordingly.

CANAN v. POUND MANUF'G CO.

(*Circuit Court, N. D. New York.* March 10, 1885.)

PATENTS FOR INVENTIONS—EXPIRATION OF FOREIGN PATENT—REV. ST. § 4887—
RECITALS IN LETTERS.

A patent granted for an invention which has been previously patented in a foreign country is not void because not limited on its face to expire at the expiration of the foreign patent, but will be valid for the term of the foreign patent only.

At Law.

Crowley & Laughlin, for complainant.

Ellsworth & Potter and *Worth Osgood*, for defendants.

WALLACE, J. The defendant insists that the plaintiff's patent is void because it is granted for the term of 17 years from the date of its issue, August 12, 1879, and is not limited upon its face to expire December 5, 1883, the time of the expiration of the plaintiff's Canadian patent for the same invention. This position is founded on the language of section 4887, Rev. St., which declares "that every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, with the one having the shortest term; and in no case shall it be in force more than 17 years." Reading this section without reference to the context, it would fairly authorize the argument that the limitation should be expressed upon the face of the patent; and if this were the true meaning of the law, a serious question would arise whether a patent issued in disregard of the mandate would not be void. But the section is to be read in connection with sections 4883, 4884, and 4885, and resort may be had for interpretation to the pre-existing statutes; and thus read there seems to be no room for fair doubt that section 4887 is not to be construed as requiring the limitation to be expressed in the patent, but merely as controlling the effect or duration of the grant.

Sections 4883, 4884, and 4885 prescribe the formalities by which patents shall be authenticated, and what they are to recite and contain. Section 4884 enacts that "every patent shall contain a short title or description of the invention or discovery, * * * and a grant to the patentee, his heirs or assigns, for the term of 17 years, of the exclusive right to make, use, and vend the invention," etc. There is an apparent conflict between the requirements of this sec-

tion and those of section 4887, but upon resorting to the original sources of the provisions it will be seen that this conflict is apparent only. Where the meaning of the Revised Statutes is plain the court cannot recur to the original statutes to see if errors were committed in revising them, but it may do so when necessary to construe doubtful language used in the Revision. *U. S. v. Bowen*, 100 U. S. 508. Sections 4883, 4884, 4885, and 4887 are reproduced from sections 21, 22, 23, and 25 of the act of July 8, 1870, revising and amending the statutes relating to patents. The first three sections relate to the regulations which are to be observed by the executive department respecting the form and contents of the instrument which they are to issue to the patentee. Section 25 relates to the rights which may be acquired by an inventor or discoverer who has previously patented his invention in a foreign country. It did not enact that his patent should "be limited so as to expire" at the same time with his foreign patent, but declared that his patent should "expire at the same time" with the foreign patent. Obviously congress was considering the effect and extent of the grant to such a patentee, the estate with which he would be invested when his patent had been issued, and not the formal requisites or terms of the instrument evidencing the grant. This is very clear by reference to the other provisions of that section, all of which relate to conditions which may defeat his patent.

The change of phraseology in section 4887 by which the words "shall be so limited as to expire" are substituted in place of the words in section 25, "shall expire at the same time," should not be interpreted as intended to control the provisions of section 4884. The word "limited," as used in reference to the term of duration of a patent where the invention has been first patented in a foreign country, originated in section 6 of the patent act of 1839, where it was declared that "every such patent shall be limited to the term of 14 years from the date or publication of such foreign letters patent." In the case of *Smith v. Ely*, 5 McLean, 76, it was held that the patent to Morse for the electric telegraph was void under this section because having first been patented in France, the letters patent here did not upon its face limit the term of the grant to 14 years from the date or publication of the foreign patent. The court held that the patent was issued not only without authority of law, but in violation of it. This conclusion was overruled by the supreme court in *O'Reilly v. Morse*, 15 How. 62, where the point was distinctly made that the patent was void because it ran 14 years from the date of its issue instead of that length of time from the date of the French patent; but the court held that the only effect of the French patent was to limit the monopoly to 14 years from the date of that patent. From that time to the present the general practice of the patent-office it is understood has been to issue patents where a foreign patent has been obtained by the patentee, reciting a grant for the full term authorized by law in the case of ordinary patents without any limita-

tion upon the face of the instruments. If it had been intended in the revision of the statutes to introduce a new rule or change the construction which had been placed by the supreme court and the executive department upon the former provisions of law, plain and unequivocal language would have been employed which would have demonstrated that intention beyond a doubt.

In several cases in this circuit and other circuits similar patents have been under consideration, and been treated as valid for the term of the foreign patent, although upon their face they specified a longer term. *Weston v. White*, 13 Blatchf. 364; *Henry v. Providence Tool Co.* 3 Ban. & A. 501; *Reissner v. Sharp*, 16 Blatchf. 383; *De Florez v. Raynolds*, 17 Blatchf. 436; S. C. 8 FED. REP. 434; *Holmes Electric Co. v. Metropolitan Co.* 21 FED. REP. 458. The point now taken was not considered in these cases, but it could not have escaped the attention of the judges. No court would direct a decree or order a preliminary injunction upon a patent void upon its face, and the circumstance that the point was not adverted to implies that it was not thought to have any merit.

Judgment is ordered for plaintiff for \$133, with interest.

KAPPES and others v. HARTUNG.

(Circuit Court, S. D. New York. February, 1885.)

PATENTS FOR INVENTIONS—MOSAIC FLOORS—KAPPES' PATENT—INVENTION.

Patent No. 87,853, granted to J. George Kappes, March 16, 1869, for an improved mosaic floor, held void for want of invention.

In Equity.

Briesen & Steele and *Antonio Knauth*, for complainants.

Ludwig Semler, *Edward C. Schaffer*, and *Frost & Coe*, for defendant.

COXE, J. This suit is brought by the complainants, as representatives of J. George Kappes, deceased, for infringement of letters patent, No. 87,853, granted to him March 16, 1869, for an improved mosaic floor. The patentee says:

"This invention relates to a new manner of arranging the lower soft-wood layer of that kind of mosaic floors in which the ornaments are produced from very thin pieces of hard wood; and the invention consists in constructing the said soft-wood layer of narrow pieces, or bars, which are grouped together in such manner that the separate plates, composed of such groups, will not be able to shrink, so as not to displace the hard-wood covering which is glued upon them."

A number of narrow, parallel strips of soft wood, *b, b*, are connected by tongues and grooves. To the ends of these are fastened, in like manner, transverse strips, *c, c*, of equal thickness, the grain

of the end and parallel strips running at right angles. Upon the top of the plates thus constructed the mosaic flooring, *a*, is laid. The claim is as follows: "The combination of the parallel bars, *b*, *b*, cross-bars, *c*, *c*, and the upper layer, *a*, connected together in the manner described, the whole forming squares for mosaic floors, as herein set forth and shown." The defenses are, prior use and lack of invention. It therefore becomes necessary to ascertain what was known, prior to the patent, with reference to flooring of this character and other kindred subjects.

The complainants' expert testifies that "the tongued and grooved arrangement between the center strip is so old and well known a device in carpentry as to be in no sense an element of the invention in question." The patentee admits, in the description, that sectional marquetry flooring, laid upon single pieces of soft wood, was old. The defendant proved, by uncontradicted testimony, that the precise construction of the lower layer, as shown in the specification, was very old, and had before been used in pastry-boards, drawing-boards, doors, wainscoting, portable sectional floors, table tops, mirror backs, wash-tub lids, door-jam heads, desk tops, drawer fronts, fire-place inclosures, church-pew backs, counter fronts, and, in many instances, as a foundation for hard-wood veneer. The defendant also proved that in 1864 the firm of Ziegler & Co. imported, from Vienna, designs of marquetry flooring similar in every respect to the construction shown in the patent; that they remained, as samples, in the possession of the firm till 1879, when they were sold with the rest of the stock at public auction. During this time they were openly and frequently exhibited to customers. It is by no means certain that the defendant has not succeeded in proving a complete anticipation by the evidence relating to the Vienna designs. *Parker v. Ferguson*, 1 Blatchf. C. C. 407. But let it be assumed that the record shows nothing more than this; that both the mosaic flooring and the soft-wood foundation were well known; that the former had previously been laid, in sections, on single pieces of soft wood, and that the latter had been used as a foundation for hard-wood veneer. In the light of all this knowledge is the person who simply laid hard-wood marquetry on soft-wood strips, tongued and grooved together, entitled to the rewards of an inventor? Doubtless a floor constructed on the principle of the lower layer described in the patent, would preserve a carpet or an oil-cloth longer than an ordinary one, but is he who first lays down an oil-cloth on such a floor entitled to a monopoly—to a patent for a combination of the oil-cloth with the flooring? The men who placed the old swiveling car-truck under the forward end of a locomotive, who substituted the figured roller for the plain one, who attached the mirror to the front hood of a street car, displayed, respectively, as much ingenuity as he who placed the old soft-wood foundation under the old mosaic flooring. *Pennsylvania R. Co. v. Locomotive Truck Co.* 110 U. S. 490; S. C. 4 Sup. Ct. Rep. 220; *Stimpson v. Woodman*, 10

Wall. 117; *Stephenson v. Brooklyn Cross-town R. Co.* 14 FED. REP. 457.

Giving to the evidence the most favorable interpretation for the complainants, it shows that Kappes exercised mechanical skill merely. The problem was to produce a suitable foundation for an inlaid floor. Experience had demonstrated that strips of soft wood, tongued and grooved, and provided with end-pieces, would, for many purposes, resist the tendency to shrink and swell. This Kappes knew. He constructed a square in the well-known manner, and said, "Lay the flooring on that." This was not invention. It was what any skilled cabinet-maker would say. To adopt the language of the supreme court in the recent case of *Hollister v. Manufacturing Co.* 5 Sup. Ct. Rep. 717, the idea seems "not to spring from that intuitive faculty of the mind put forth in the search for new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision, but, on the other hand, to be the suggestion of that common experience which arose spontaneously and by a necessity of human reasoning in the minds of those who had become acquainted with the circumstances with which they had to deal. * * * It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the material supplied, by a special knowledge, and the facility of manipulation, which results from its habitual and intelligent practice; and is in no sense the creative work of that inventive faculty which it is the purpose of the constitution and the patent laws to encourage and reward."

There should be a decree for defendant.

DAY V. FAIR HAVEN & W. R. Co.

(Circuit Court, D. Connecticut. March 16, 1885.)

PATENTS FOR INVENTIONS—DAY SNOW-PLOW—INVENTION.

The fourth claim of reissued patent No. 8,388, granted to Augustus Day, August 27, 1878, for a horse railway track-clearer, or snow-plow, held void for want of invention; following *Hollister v. Manufacturing Co.* 5 Sup. Ct. Rep. 717.

In Equity.

Sprague & Hunt, for plaintiff.

Wm. Edgar Simonds, for defendant.

SHIPMAN, J. This is a bill in equity to prevent the infringement of the fourth claim of reissued letters patent No. 8,388, granted to Augustus Day, August 27, 1878, for a horse railway track-clearer or snow-plow. The original patent was granted April 9, 1872. The invention is said, in the original specification, to consist "in the combination of a pair of independently acting scrapers, pivotally secured

to the floor of a car, and resting upon the track, when in operation, wholly by their own weight, with means for raising and lowering such scrapers simultaneously; in the combination, with an independently acting scraper, resting, when in operation, wholly by its own weight upon the track, of a draw-bar, in the direct line of draught, and a supplemental and diagonal draw-bar, which at the same time acts as a brace, the forward ends of both of said bars being secured on the same axial line; in the peculiar construction and arrangement of a cast-shank with relation to the scraper, which is secured thereto, and the draught-irons which connect it to the under side of the car; in the pendent guards, which lift the scraper from the track on meeting with an obstruction on the outside of the rail, and deflect outwardly from the track; and in a peculiar crank for operating the shaft, which raises and lowers the pair of scrapers at each end of the car."

The fourth of the nine claims of the reissued patent is for "the combination, with the draw-bar, C, and scraper, A, of the diagonal brace, E, as and for the purpose set forth."

The whole apparatus is apparently a skillfully contrived and an efficient track-clearer, but as the fourth claim is a very broad and simple one, it is only necessary to speak of so much of the mechanism as is included in that claim. That part of the apparatus consists of a draw-bar pivoted to the bottom of the car, and a scraper diagonally set across the rail in a manner not unusual. As the scraper, when in operation, rests upon the track, it is, of course, subjected to lateral pressure in moving obstructions from the rail. To resist this pressure, and to prevent the scraper from being crowded inward, a diagonal brace is secured to the rear end of the draw-bar, and is pivoted to the bottom of the car near its longitudinal center; the draw-bar and brace being pivoted in the same axial line, "so that when it is desired to raise and lower the scrapers, the same will be done without disturbing the vertical position thereof with relation to the track."

The track-clearers of the defendant have a scraper, and a draw-bar in the line of the draught, and a diagonal brace, the two bars being pivoted to the car in the same axial line; but the methods by which they are fastened to the scraper or to the car are not the methods of the patent. The defendant's scraper is pressed upon the track by elastic steel arms.

The fourth claim is for a scraper and a draw-bar in the line of the draught, irrespective of the method of pivoting scraper and draw-bar together, or the method of raising and lowering either, and a diagonal brace irrespective of the method by which it is fastened to the draw-bar or to the car, except that the bar and the brace must be pivoted on the same axial line. The scraper and the draw-bar were both old. The only part of the combination which is claimed to be new is the diagonal brace to enable the scraper to be kept in its place on the track. The method by which these two bars are secured to the

scraper, or to each other and to the car, and the method by which the scraper, draw-bar, and brace can be easily and effectively raised and lowered from the platform of the car, undoubtedly required inventive skill; but the mere employment of a diagonal brace pivoted to the car in the same axial line with the draw-bar, to resist lateral pressure upon the scraper, if such resistance was deemed important, seems to me the obvious and natural suggestion which would occur to any mechanic. The use of a diagonal stay to resist a strain upon a sled or sleigh runner, and, in general, the use of a "corner brace," to resist tendency to lateral displacement, are within the range of the most ordinary mechanical knowledge and of common experience, and this is about all that the patentee included in this claim. Being simply for the addition of a diagonal brace to the draw-bar for the purpose of resisting lateral pressure upon the scraper, the only mechanical requirement being that the bar and the brace should be pivoted upon the same axial line, and not including the patented mechanism by which either of the three members of the combination is secured to the other, or is made effective, the claim is so general that it does not define the actual invention of the patentee. That is stated in the other claims. The suggestion of the patentee in the reissued but not in the original patent, that the diagonal brace serves also as a supplementary draw-bar, was not important, and does not seem to have been so considered by his expert witnesses.

I cannot perceive that the mechanism which is included in the fourth claim was an "invention," in view of the definitions of that word in recent decision of the supreme court. *Hollister v. Manufacturing Co.* 5 Sup. Ct. Rep. 717.

The bill is dismissed.

NEW YORK BUNG & BUSHING CO. v. DOELGER.

(Circuit Court, S. D. New York. March 7, 1885.)

PATENTS FOR INVENTIONS—BUNGS AND BUSHINGS—REISSUE No. 10,368—PATENT No. 107,473.

Reissue patent No. 10,368, granted to the New York Bung & Bushing Company August 25, 1883, for an improvement in bungs and bushings, compared with patent No. 107,473, granted to Vincent Fountain, Jr., September 20, 1870, for an improvement in bungs, and *held* void for want of invention, and not infringed by defendant.

In Equity.

Louis W. Frost and Wyllys Hodges, for complainant.

Henry Brodhead and Philip R. Voorhees, for defendant.

COXE, J. This is an equity action for infringement, founded upon reissued letters patent No. 10,368, granted to the complainant August

25, 1883, for an improvement in bungs and bushings. The original patent, No. 141,473, was granted to Samuel R. Thompson, August 5, 1873, for an improvement in bushings for faucet holes. It was first reissued, No. 8,483, to McKean, Jackson, and Brown, November 12, 1878. This reissue having been pronounced invalid, as containing an unlawfully expanded claim, the patent was again reissued in form substantially like the original, except that the inventor limits the construction of the bushing to wood. The second reissue is the one in controversy. The inventor declares:

"The present invention relates to certain new and useful improvements in bushings for faucet-holes of barrels, etc., having for their principal object the production of a simple, economical, and effective bushing that will admit of the easy adjustment and withdrawal of the faucet without injury to the barrel, and that may be readily and cheaply replaced when worn. My improvements consist, mainly, of a bushing of wood, etc., constructed and arranged, as will be hereinafter more fully described, so as to receive and allow of the yielding either way of a faucet, which, when slightly struck, is readily withdrawn from the bushing without detriment to the barrel. * * * In my original specification I mentioned the use of other material than wood for the bushing, *a*. This I desire now to disclaim, and confine my invention to wood alone, in combination with the protecting casing, *b*, or to the casing, *a*, of wood alone, when made with the interior bevels."

The first claim of the reissue, the second of the original, is the only one in controversy, and is in these words: "The combination of a wooden bushing, *a*, and casing, *b*, constructed and arranged as described, and for the purposes specified." In the original the word "wooden" is omitted. The defenses are want of novelty and invention, non-infringement, and invalidity of the reissue as a reissue. As bearing upon the first of these defenses, the defendant offered in evidence letters patent No. 107,473, granted to Vincent Fountain, Jr., September 20, 1870, for an improvement in bungs. The description contains these words:

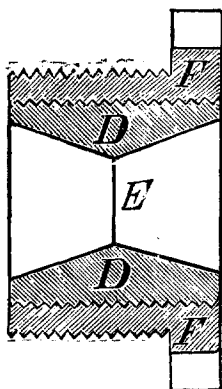
"The nature of my invention consists in the construction of a bung which has an opening through its center applicable for receiving not only a faucet for drawing off the contents of a barrel, but also for a stopper, which is inserted from the inside, as will be hereafter more fully described. * * * F is a bush, of the ordinary construction. D is a bung which has an opening extending through its centre, beveled from each side towards the line, E."

The claim is as follows:

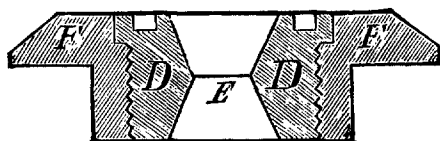
"A bung, having an opening through its center, one side of which is applicable for receiving a cork or stopper, G, and the other for receiving a faucet, in the manner and for the purposes set forth."

Here is a perfect description, in general terms at least, of the complainant's device, and if the word "wooden" were inserted before the word "bung," it can hardly be doubted that it would amount to a complete anticipation. A skilled mechanic reading such description would make precisely what Thompson made. The similarity will appear most clearly by placing the two drawings in juxtaposition.

THOMPSON'S
BUNG AND BUSHING.
AUG. 5, 1873.



FOUNTAIN'S
BUNG AND BUSHING.
SEPT. 20, 1870.



The same letters have been used to indicate corresponding parts on each of these drawings. D represents the double beveled bung, and F the bushing. In Fountain's specification the material of neither is designated. That this patent is an anticipation cannot be successfully maintained. But it seems equally clear that, in connection with the other proof, it defeats complainant's patent for want of invention. Thus, it must be conceded that after Fountain nothing remained upon which mechanical ingenuity could operate, except the choice of materials. If choosing wood for the bung was invention, choosing copper or brass for the bushing would be equally so. There is nothing in Fountain's patent which necessarily precludes the idea of wood being used. For aught that appears from the patent itself, wood was the very material he had in mind. If lead, or cork, or rubber had been named there would have been greater scope for the ingenuity of others. The question, then, is this: Did Thompson become an inventor because he made Fountain's bung of wood? If there were any doubt as to how this question should be answered, an examination of the proofs bearing upon the state of the art makes a negative answer alone possible. At the date of Thompson's application wooden bungs, wooden bungs with double conical holes through them, bungs inclosed in bushings, having beveled openings through the center to receive the faucet, iron bushings, and wooden plugs in iron bushings were all old. It was also well known that the elasticity of wood presented a suitable yielding bearing to hold a faucet. With the theater of invention thus crowded to its utmost capacity, with scarcely room for another actor on the stage, can it be said that he who merely suggests the change, in an old device, of one known material for another which had been previously used for kindred purposes, possesses what the supreme court defines as "that intuitive faculty of the mind put forth in the search for new results or new

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methods, creating what had not before existed, or bringing to light what lay hidden from vision?" *Hollister v. Manufacturing Co.* 5 Sup. Ct. Rep. 717.

The mere substitution of one known material for another has been decided over and over again to be insufficient to sustain a patent. In *Hotchkiss v. Greenwood*, 11 How. 248, porcelain was substituted for wood or metal in the manufacture of door-knobs. Mr. Justice NELSON, speaking for the court, says:

"Now it may very well be, that, by connecting the clay or porcelain knob with the metallic shank in this well-known mode, an article is produced better and cheaper than in the case of the metallic or wood knob; but this does not result from any new mechanical device or contrivance, but from the fact that the material of which the knob is composed happens to be better adapted to the purpose for which it is made. The improvement consists in the superiority of the material, and which is not new, over that previously employed in making the knob. But this, of itself, can never be the subject of a patent. No one will pretend that a machine made, in whole or in part, of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one, or, in the sense of the patent law, can entitle the manufacturer to a patent. The difference is formal, and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purposes intended, but nothing more."

In *Hicks v. Kelsey*, 18 Wall. 670, the change from wood to iron in a wagon-reach; in *Palmenburg v. Buchholz*, 21 Blatchf. C. C. 162; S. C. 13 FED. REP. 672, the substitution of *papier-mache* for the wire of the frame of a lay figure; and, in a case referred to in *Hotchkiss v. Greenwood*, *supra*, "the substitution of wood for bone as the basis of a button covered with tin," were held, respectively, to be wanting in patentable novelty. See, also, *Collins Co. v. Coes*, 21 FED. REP. 38; *Brown v. Piper*, 91 U. S. 37; *Roberts v. Ryer*, Id. 150; *Smith v. Nichols*, 21 Wall. 112; *Pickering v. McCullough*, 104 U. S. 310; *Welling v. Crane*, 14 FED. REP. 571; Walk. Pat. § 28; Sim. Pat. 31. The case of *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, has been examined, and it is thought that it enunciates no principle in conflict with the position here taken. It must, therefore, be decided, in the language of *Palmenburg v. Buchholz*, *supra*, that, "although the device may have been mechanically new, it was not intellectually novel."

But upon the question of infringement the difficulties which confront the complainant are almost equally as numerous and insurmountable. In the case of *This Complainant v. Hoffman*, 20 Blatchf. C. C. 3, S. C. 9 FED. REP. 199, this court decided, in substance, that the first reissue was void, because it sought to do precisely what complainant now seeks to do, viz., to cover broadly a hollow wooden bung inside an iron or rigid bushing. The court was unquestionably right in holding that this reissue, if valid, was infringed. To hold, however, that the defendant's device infringes the original or second re-

issue, is quite a different proposition. What the defendant uses is covered by the broad claim of the first reissue; but the court, in the *Hoffman Case*, decided that the patentee was not permitted to claim "any form of a wooden bushing in an iron one," but that he must be confined to the particular form and combination described in the original patent. It was further decided that the form of the wooden bushing, or bung, with the double conical opening through the center, was "the very essence of that part of the invention," and could not be disregarded. How, then, does the defendant infringe? His bung is not bored through; it has no bevels; it is not screwed into the iron bushing; the iron bushing has no interior screw threads, and the bung has no exterior screw threads. If the complainant had a valid claim broadly covering a hollow wooden bung inside an iron bushing, the defendant would be compelled to pay tribute; but, confining the claim within the narrow limits indicated, it must be held that he does not infringe.

The bill is dismissed.

NEW YORK BUNG & BUSHING CO. v. FOEHRENBACH.

(Circuit Court, S. D. New York. March 7, 1885.)

COXE, J. The decision in *New York Bung & Bushing Co. v. Doelger*, ante, 191, disposes of this action also. The bill is dismissed.

ELECTRIC GAS-LIGHTING CO. v. SMITH & RHODES ELECTRIC CO.

(Circuit Court, S. D. New York. March 16, 1885.)

PATENTS FOR INVENTIONS—REISSUE—VALIDITY.

Electric Gas-lighting Co. v. Tillotson, 21 FED. REP. 568, followed, and the fifth claim of reissued patent No. 9,743, for electrical apparatus for lighting street lamps, held void.

In Equity.

Edwin H. Brown, for orator.

Samuel B. Clarke, for defendant.

WHEELER, J. The only question presented in this case now, was decided in *Electric Gas-lighting Co. v. Tillotson*, 21 FED. REP. 568, on the same patent. It is whether the fifth claim of the reissue is supported by the original, and has been reargued and reconsidered. The patent is for an electric gas-lighting apparatus. The foundation for this fifth claim is sought for in the original first claim. That

was for a circuit breaker located at the burner and operated automatically, substantially as described; this is for the combination of a wire through which a current of electricity is passed actuating mechanism for letting on the gas, an electro-magnet connected with the wire, an armature operated by the magnet, mechanism actuated by the armature breaking the circuit at the burner and producing sparks for lighting the gas, the whole operating automatically. The specification is the same in both the original and reissue. The inventor might have claimed upon it everything which he has claimed; but that is not sufficient. *Manufacturing Co. v. Ladd*, 102 U. S. 408. The reissue is between eight and nine years later than the original, and could not lawfully cover what was not either claimed in some manner in the original or included within what was so claimed. *Mahn v. Harwood*, 112 U. S. 360; S. C. 5 Sup. Ct. Rep. 174. This claim of the reissue is for machinery breaking an electric circuit at the burner and producing sparks there to light the gas. It may or may not include machinery for turning on the gas. The claim in the original was not for any machinery but the circuit breaker. It was for the circuit breaker operated, but that did not include the machinery to operate it. If it included the operation, that is a different thing from the means by which the operation is performed. *James v. Campbell*, 104 U. S. 356; *Powder Co. v. Powder Works*, 98 U. S. 126. So, whether this claim in the reissue includes the machinery for turning on the gas or not, it is for a part of the invention not claimed in the original. *Turner & S. Manuf'g Co. v. Dover Stamping Co.* 111 U. S. 319; S. C. 4 Sup. Ct. Rep. 401. And, as the claim in the original was not for any combination of parts, the combination of this claim of the reissue cannot be said to be the same combination further restricted by additional elements, and is not included in what was claimed in the original. The patent for the circuit breaker as located and operating, and machinery for turning on the gas, without the machinery for operating the circuit breaker, appears to have been satisfactory at the time when the patent was taken out, and for so long a time afterwards, that it could not be made to cover the machinery for operating the circuit breaker. The conclusion reached is the same as before.

Let there be a decree dismissing the bill of complaint.

SCOTT v. SEVENTY-FIVE TONS OF PIG-IRON.

(District Court, D. Connecticut. March 9, 1885.)

1. SALVAGE—REPLEVIN OF SALVED PROPERTY BY OWNERS—LIBEL TO ENFORCE LIEN—JURISDICTION.

When a cargo of iron, on board a vessel that has been pumped out and brought into her port of destination by salvors, has been replevied by the owners in a state court, for the express purpose of melting it up and putting it beyond the reach of any court, and the control of the state court over it was a fiction, the district court of the United States will have jurisdiction of a libel to enforce the lien of the salvors, and the iron may be seized by the marshal under monition issued by the court.

2. SAME—AMOUNT OF AWARD.

The services rendered in this case considered, and the sum of \$350 allowed to libelants as compensation, with costs.

In Admiralty.

Samuel Park, for libelant.

Arthur B. Calef and *Samuel L. Warner*, for claimants.

SHIPMAN, J. This is a libel *in rem* for salvage. On October 21, 1884, the schooner *Emily*, a vessel about 32 years old and then worth, with her appurtenances, about \$400, left Perth Amboy with a load of 120 tons of pig-iron, of which 75 tons were consigned to the claimants, the Stiles & Parker Press Company, of Middletown, in this district. Herbert S. Goodale was the captain of the schooner and owned three-fourths of her. One other man constituted the crew. There was no insurance upon her. She went through Hell Gate on October 23d, and on October 25th went down the sound with a north-west wind and strong breeze. Near Shippan Point the foremast, which was an old article, cracked or broke. The mainsail was torn and carried away by the wind. The vessel commenced to leak badly, and the captain ran her into Norwalk harbor, about three-fourths of a mile from the sound, and beached her in a safe and land-locked place, and upon a soft bottom. She filled with water. At high tide she was seven feet under water. At low tide the deck was out of water.

The captain could not find assistance to get his boat or cargo off, and on Sunday, October 26th, telegraphed to the libelant that the schooner was sunk off Norwalk harbor and asked for assistance. The libelant is well known throughout the sound to be engaged in the business of saving wrecked vessels and cargoes, and owns at least two vessels equipped with all the appliances needful for said business, constantly manned and in readiness. The master and crew were not guilty of fraud and had no motive to commit fraud, either in beaching the vessel or in sending for the libelant, and there was no collusion between him and the captain or the crew. The libelant sent on the morning of October 27th, the schooner *Report* and steam-tug *Alert*, Capt. Chesebro in command, with six men on board of each vessel, to the assistance of the *Emily*. The boats reached the wreck

on the evening of the same day, and found her under water, her foremast broken and mainsail and jib torn. Capt. Chesebro made a contract that evening with Capt. Goodale, by which the libelant was to receive 50 per cent. of the value of the saved property delivered at its destination. On the next day, at low water, the schooner was pumped out in three or four hours' time, and was pumped out twice during the night of that day. The 30th and 31st were stormy and the schooner was kept pumped out. On the 31st the only apparent leak in the vessel, about a foot long in the "tuck seam," was found and was temporarily stopped. On November 2d, the libelant's boats, with the *Emily*, left Norwalk harbor and stopped about 20 hours in the sound, five or six miles from Norwalk, to take some iron out of another sunken vessel, the *Marietta*. The contract for this service was made by the libelant in New York after the 26th. While this service was being performed, the *Emily* lay about 400 yards from the *Marietta*. The *Emily* was then towed to Bridgeport and 25 tons of iron were delivered to the owners, and then was towed to Middletown. The libelant demanded salvage upon the 75 tons from the claimants, who refused to pay, and brought a writ of replevin for said iron before the superior court for Middlesex county, upon which writ the iron was seized by the sheriff and delivered to the claimants, was put in their store-house, and was immediately put by them into the furnace, in their ordinary business, at the rate of one or two tons per day. The replevin suit was brought to enable the claimants to obtain and to use up the iron promptly. They did not intend that it should be kept in the possession of anybody. The statutory bond was given for the return of the property to the defendants if the plaintiffs failed to establish their right to the possession of the same. The libelant and Capt. Goodale were made defendants.

The libelant subsequently libeled the iron which was not melted, and which was in the claimants' exclusive possession, and possession thereof was taken by the marshal. After the trial of this case, the claimants gave to the marshal a delivery bond, conditioned to be void if they performed the decree of the court in the matter of the libel, and the iron was delivered to them. The value of the iron was \$1,515. The libelant's two vessels and appurtenances, which went to Norwalk, are worth \$16,000.

The first question relates to the jurisdiction of this court, and arises upon the principle which has been often asserted in the decisions of the supreme court, and which is stated in *Buck v. Colbath*, 3 Wall. 334, as follows:

"That principle is that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or of some superior jurisdiction in the premises. * * * This principle, however, has its limitations, or rather its just

definition is to be attended to. It is only while the property is in the possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

If the property was either actually or constructively in the custody of the state court at the time of the service of the monition, no valid seizure of it could be made by the marshal, and this court would have no jurisdiction of this libel. The mere fact that it was in the possession of the claimants would not prevent its being in the custody of the law, and if it was in their hands awaiting the decision of the state court, and in readiness, upon its judgment of return, to be delivered to the defendants in the replevin suit, it would have been incumbent upon the libelant to wait until such an order had been made and the litigation was at an end. But it is idle to say that the iron was in the custody of the law, when the purpose and the effect of the replevin suit were to remove it from the custody of any court, and to prevent it from being subject to any order, and when the object of putting legal machinery in motion was to enable the plaintiffs to effectually preclude its return to the defendants. It is a misuse of terms to say that the iron was in the possession or control of the state court, and it would be an abuse of the authority of that court if such a fiction as its pretended custody of this property should be made to prevent the exercise over it of the ordinary jurisdiction of another court.

The claimants next insist that this court has no jurisdiction because the state court can determine, in the replevin suit, the questions of the existence and the extent of the libelant's lien, and they rely upon the following language of the supreme court in *Freeman v. Howe*, 24 How. 450:

"Where a court has jurisdiction it has a right to settle every question which occurs in the case, * * * and that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court."

Without stopping to inquire whether the state court could properly determine the amount of the libelant's lien upon the iron, this language is clearly explained in *Buck v. Colbath*, where the court says:

"It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits."

If the iron was in such a condition that it could rightfully be made the subject of a libel *in rem*, the libelant was not excluded from obtaining the judgment of an admiralty court upon the question of a

maritime lien, by reason of the fact that a state court, perhaps, might in another proceeding ascertain the amount which was due him, because the relief which he seeks in admiralty is very different from the relief which he could obtain in a state court.

The existence and the amount of the lien are next to be ascertained. That the *Emily* and her cargo were in distress and needed help are certain, and it is unavailing to say that she ought not to have been in distress. I think that the trouble happened because the schooner was very old, and, with a heavy cargo, was unable to withstand much of a strain, and, moreover, she was insufficiently manned. The libellant, whose business it is to save vessels in distress, was telegraphed to go to her aid, without any previous knowledge that his services were or would be wanted, and in response he sent his vessels amply equipped. They found the vessel in a safe land-locked place, on the mud, in the bottom of Norwalk harbor, but she could not be got away without skilled and energetic and expensive assistance.

The contract which the captain of the *Emily* entered into was an improvident one, so far as the cargo is concerned, in view of the ease with which the libellant could furnish assistance and the lack of immediate peril to the cargo. The rate is too large, under the circumstances of the case, to receive the sanction of the court.

The facts which bear upon the amount of compensation are that the assistance of a skilled man, whose property consists of vessels equipped and manned for saving cargoes, and whose business it is to render dangerous, laborious, and expensive services, was sought; that he sent a sailing vessel, a steam-tug, and 12 men, to aid the schooner and cargo; that the situation of the submerged vessel, though it needed assistance, was not immediately perilous; that the work of raising the vessel by the aid of the libellant's steam-pumps was easy; and that there was no danger to his crews or his property. It is not a case which calls for very large compensation, but the libellant should receive a liberal amount when he is honestly engaged in this uncertain and expensive business.

The sum of \$350 is allowed, with costs.

THE KINGSTON.

(*District Court, D. New Jersey. March 4, 1885.*)

1. MARITIME LIENS—MATERIAL AND LABOR USED IN CONSTRUCTION OF VESSEL—CONTRACT.

When materials are furnished and the labor is performed under a contract with the owner of a vessel, no general maritime lien can be claimed.

2. SAME—LIENS GIVEN BY STATE LAW—HOW ENFORCED IN UNITED STATES DISTRICT COURT.

When it is attempted in the district court to give effect to liens created by state laws, they are enforced subject to all the qualifications and limitations imposed by those laws.

3. SAME—JURISDICTION OF DISTRICT COURTS—ADMIRALTY RULE No. 12.

The district courts of the United States have no jurisdiction to enforce liens arising under state laws, except when they are founded upon a contract maritime in its character.

Libel in rem.

The libel is filed in this case against the ferry-boat Kingston, to recover for materials furnished and work done upon the said steamer while she was in the course of construction at Newburgh, in the state of New York, and after she was launched and removed to Weehawken, in the state of New Jersey. The libel alleges that in the year 1883 the said ferry-boat, being then at Newburgh, in the state of New York, and being in need of certain appliances and machinery for electric lighting, the libelant, at the request of the owners or authorized agents of said ferry-boat, did agree to furnish the boat with such machinery and appliances, for the sum of \$2,625, to be paid upon trial and acceptance of the same. Certain of the materials and some of the labor necessary therefor were furnished by the libelant at Newburgh, and then the said ferry-boat, having proceeded to Weehawken, in the state of New Jersey, the libelant did continue to furnish necessary materials and labor for such electric lighting, and did, in the month of November, 1883, complete the said machinery and appliances, which were thereafter, and in the month of December, 1883, accepted by the West Shore & Ontario Terminal Company, the owner of the said ferry-boat. The said West Shore & Ontario Terminal Company then was and still is a corporation organized and existing under the laws of the state of New Jersey. The libel further alleges that no part of the contract price for materials and labor has been paid, and claims that the libelant has a lien upon the said ferry-boat for the sum due under the general maritime law and the statutes of the states of New York and New Jersey.

The West Shore & Ontario Terminal Company have filed a claim as owner of the boat, and answered, setting up that on or about March 7, 1883, while the boat was in the course of construction at Newburgh, in the state of New York, by Ward, Stanton & Co., for the New York, Ontario & Western Railway Company, under contract, and before said ferry-boat was completed, or was even registered or enrolled, licensed or surveyed, the said libelant entered into a contract with the said New York, Ontario & Western Railway Company, at New York City, whereby said libelant contracted and agreed with said railway company to furnish said ferry-boat with certain electric lighting apparatus and appurtenances for the sum of \$2,625; that afterwards the said railway company sold said boat, at a fair and *bona fide* sale, to the West Shore & Ontario Terminal Company, and the said terminal company did, by a certain agreement, dated July 15, 1883, between the said terminal company, of the first part, the New York, West Shore & Buffalo Railway Company, of the second part, and the New York, Ontario & Western Railway Company, of the third part,

lease said boat and other property to the said two railway companies, jointly, for the period of 99 years from the first day of August, 1883; for which reasons they allege that the libelant has no claim or lien on said boat, but its remedy, if any, is against the New York, Ontario & Western Railway Company; that the services performed and materials furnished were not performed or furnished upon the credit of the boat, but under said contract, and upon the credit of the New York, Ontario & Western Railway Company; and that the libelant is not entitled to the lien claimed by it under the statutes of New Jersey, because the contract was not made within the state of New Jersey, and because the greater part of said materials and services were furnished and performed, not in the state of New Jersey, but in the state of New York, and because more than nine months have elapsed since said debt was contracted. The receivers of the New York, West Shore & Buffalo Railway Company have also answered as lessees of the said ferry-boat, and have set up substantially the same defense.

Butler, Stillman & Hubbard, for libelants.

Vredenburg & Garretson, for respondents.

Nixon, J. 1. Does a lien exist under the general maritime law? The libel admits, the answers claim, and the testimony shows that the materials were furnished and the labor performed under a formal written contract, executed in New York, between the libelant and the owner of the boat then in the course of construction, and not yet finished, or documented in any custom-house. I will not stop here to inquire whether any maritime lien can be implied for materials and labor furnished to a vessel thus circumstanced, with neither enrollment nor license, and not yet ready for employment in commerce or navigation. Waiving that, for the present, it seems to be settled in the American admiralty that, where the materials are furnished and the labor is performed under a contract with the owner of the vessel, no general maritime lien can be claimed. The question was discussed and settled by the supreme court in *The St. Jago de Cuba*, 9 Wheat. 416, and I am not aware that their decision has been qualified or overruled, in any subsequent case. The court there said:

"The necessities of commerce require that, when remote from his owner, he (the master) should be able to subject his owner's property to that liability, (a lien,) without which it is reasonable to suppose he will not be able to pursue his owner's interests. But when the owner is present the reason ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived."

The same question was before Judge HOPKINSON, of the Eastern district of Pennsylvania, in *Sarchet v. The Davis*, Crabbe, 196, and was examined with his usual discrimination and care, and he reached the same result.

But it is insisted that if no general maritime lien exists, a lien has been created by the state laws of New York and New Jersey which

the courts of the United States should enforce. In the first place, it is questionable whether any lien has in fact arisen under the provisions of the laws of either of these states. When it is attempted here to give effect to liens created by state laws, they are enforced subject to all the qualifications and limitations imposed by those laws. It is provided in the New York statute that the debt contracted for materials or labor on any ship or vessel "shall cease to be a lien whenever the ship or vessel shall leave the port at which such debt was contracted, unless the person having the lien shall, within twelve days after such departure, cause to be drawn up and filed specifications of such lien, which may consist either of a bill of particulars of the demand or a copy of any written contract under which the work may be done, with a statement of the amount claimed to be due from such vessel, the correctness of which amount shall be sworn to by such person, or his agent or representative." The debt in this case was contracted in New York while the boat was being built at Newburgh; but after the commencement of the work she was removed out of the port of New York and taken to Weehawken, a port in New Jersey, where the residue of the labor was performed and the materials furnished. There is no proof that any specifications or copy of the contract have been filed in New York, verified by the oath of the parties, which seems to have been necessary in order that any lien should continue to attach.

The New Jersey statute agrees to give liens only for debts contracted within that state. The materials were furnished and the labor done under a contract executed in New York, and made with the owner of the boat before she was finished and ready for service on the water. Does it not follow, under such circumstances, that the libellant waived the lien, and intended to look to the personal responsibility of the owner? But, in the next place, and without expressing an opinion on the above facts, have the district courts of the United States any jurisdiction to enforce liens arising under state laws, except where they are founded upon a contract maritime in its character?

The proceedings in this case are under the twelfth rule of admiralty practice. This rule, as prescribed by the supreme court in 1844, authorized a libel *in rem* where the local law of a state gave a lien upon a vessel for supplies or repairs in her home port. Another change was made in 1859, taking away the right to proceed *in rem* against domestic vessels for supplies or necessities, although a lien was created by the state law. It stood thus until 1872, when the court announced the rule as it now is, to-wit:

"That in all suits by material-men for supplies or repairs or other necessities, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*."

There has been much conflict in the courts as to the meaning of the new rule, but since its adoption the supreme court, in *The Lot-tawanna*, 21 Wall. 580, held that the district courts of the United

States, having jurisdiction of the contract as a maritime one, might enforce liens given for its security, even when created by the state laws. The inference is plain that the court meant to affirm that no such jurisdiction existed when the contract was not of a maritime nature.

The libel is therefore dismissed for want of jurisdiction.

THE PAVONIA.¹

(District Court, S. D. New York. February 27, 1885.)

1. COLLISION—MISCALCULATION OF PILOT—LOOKOUT.

The ferry-boat P. was approaching her New York slip on the North river on a strong flood-tide, which compelled her to go below her slip and swing into it as the tide swept her up. The ferry-boat W., running on a different ferry, at this moment came out of her slip, 744 feet below that of the P. It was the custom of the W. to go to the right of the P. on such occasions, if the P. were "well out" in the river, otherwise to go to the left. On this occasion, the pilot of the W., judging that the P. was well out in the stream, attempted to go to the right, when the P. was already swinging in, and in about 45 seconds after leaving her slip struck the W. on her port side. The pilot of the P. was giving his entire attention to making his slip; the deck hand who should have acted as lookout was under the hood, and did not see or report the W. until a few seconds before collision, when the P., too late, reversed full speed. *Held*, that the W. was in fault in misjudging the distance of the P. and in attempting to go inside and across her bows; and that the P. was in fault in not having a lookout besides the pilot properly stationed and attentive to his duties; and that the damages should be divided.

2. SAME—FERRY-BOATS—NECESSITY OF LOOKOUT.

The legal obligation of ferry-boats to maintain an efficient lookout has been repeatedly declared, and can never be relaxed.

In Admiralty.

Abbett & Fuller, for libelants.

Wilcox, Adams & Macklin, for claimants.

BROWN, J. At about 6:30 P. M. on the fifteenth of October, 1883, as the Erie ferry-boat Pavonia was approaching her slip at the foot of Chambers street on the North river, she ran into the starboard side of the ferry-boat Weehawken, of the Hoboken ferry, running from the foot of Barclay street. This libel was filed for the recovery of the damages arising from the collision. The tide was strong flood, and the wind heavy from the north-west. It was dusk; but bright moonlight and clear. The upper side of the Barclay-street slip is 744 feet below the upper corner of the Providence pier, which forms the lower side of the Chambers-street slip. The Pavonia was intending to make the upper division of the Chambers-street slip; the lower division being occupied by her sister boat. The flood-tide, at its strength, sweeps past these piers at about the rate of three knots or over. To make their landings on the New York shore at such a time,

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

the ferry-boats from the west shore usually go somewhat below the slip, and run into it as they drift upwards. Such, according to the testimony of the witnesses on the part of the Pavonia, was her course at this time. Every natural probability gives it credit, there being no obstructions in the way. The pilot testifies that before making his final swing to run into the slip, he looked to see if the Barclay-street boat was coming out, it being time for her, but could not see her; that he then put his wheel hard a-starboard, and swung for his slip, to which he gave his whole attention, until the Weehawken appeared very near to him, when he reversed his engine, but not in season to stop and prevent the collision; and that the collision took place within 100 or 200 feet of the end of the Providence pier and opposite to it.

On the part of the Weehawken it is admitted that, inasmuch as the boats cross each other's course, the established practice is that the Barclay-street boats on a flood-tide shall pass inside, that is, to the right, if the Erie boats are at the time "well out" in the river, *i. e.*, 1,000 feet or upwards; but that otherwise they must go outside of the Erie boats in order to permit the latter to make their landings. This is a manifest necessity to which, under rule 24, the prior rules give way. Her witnesses say that as the Weehawken left her slip the Pavonia was "well out" in the river; that she had not got down as far as the Chambers-street slip, and had not commenced her turn for the slip, which she would not usually do until she had passed below Chambers street; that the collision itself took place some 400 or 500 feet out in the river, opposite the Erie pier, which forms the upper side of the Chambers-street slip, and occurred in consequence of the Pavonia's turning rapidly about, under a starboard helm, and trying to run ahead of the Weehawken. There is considerable testimony on the part of the Weehawken to sustain this theory and the place of the collision as alleged in her behalf. Repeated consideration of the testimony compels me to reject this account as to the place of the collision. I am satisfied it was opposite, or very nearly opposite, the Providence pier, on the lower side of the slip, or a little only above it, and occurred as the Pavonia was coming in her usual course to make the upper rack, and that it was not more than 200 feet outside of the lower pier. The boats, doubtless, within half a minute after had drifted up abreast of the upper pier, and thereby had come nearly into the position testified to by the Weehawken's witnesses, except as to distance out in the river.

The testimony of the pilot of the Secaucus, which lay out in the stream, is referred to as establishing the position of the boats opposite the upper pier at the time of the collision, because the pilot testifies that he could see the bridge of the slip astern of the boats. This, however, is not of much weight, unless the exact position of the Secaucus were known, and that is as liable to error as the position of the Pavonia; and also because, as I have said, the boats drifted im-

mediately to the upper pier, and the Weehawken, being under full headway, would have passed from one pier to the other in about 15 seconds.

There are circumstances that strongly confirm the account of the Pavonia as to the place of the collision. Her pilot, not seeing the Weehawken, had no reason to keep off; nor, on the other hand, is there the slightest probability that, not seeing her, he would have changed his course to run into his slip at a point where it was impossible for him to make the slip. Had the Weehawken been in the position her witnesses allege, there is no conceivable reason why the Pavonia should not have continued down river in the usual manner, until she had passed somewhat below Chambers street, before her final turn for her slip. On the other hand, if the pilot's statement that he did not see the Weehawken is untrue, and if he did see her, it is not credible that he would depart from his usual course to go below Chambers street before turning, so as to be unable to make his own slip, and at the same time so as to run into the Weehawken. All the probabilities of the case, therefore, sustain the witnesses of the Pavonia as to their position nearly opposite the Providence pier at the time when the boats first collided. If that was the place of collision, the fault of the Weehawken necessarily follows; for the time that elapsed after the Weehawken left her slip until she reached the Providence pier, only 744 feet distant, considering the flood-tide, could not have been upwards of 45 seconds; and during this time the Pavonia could not possibly have come inwards more than 500 or 600 feet, at the most, across the tide; so that she could not, at the time the Weehawken left her slip, have been "well out" in the river, so as to justify the Weehawken in undertaking to go inside. The result proves that the pilot of the Weehawken miscalculated her distance out. Considering the nearness of the Pavonia to her slip, and that she was already on her swing, I conclude that it was the duty of the Weehawken to have waited and passed outside.

I cannot acquit the Pavonia of the charge of negligence in not having an efficient lookout. Assuming it to be true, as the pilot states, that just before he made his final swing for the slip he looked for the Barclay-street boats and saw none coming out, it is clear that it must have been very nearly at the same time, at all events but a few seconds afterwards, that the Weehawken started out. The Pavonia's lights, and the changes in them that the pilot of the Weehawken saw, show that she was then just commencing her final swing. From that time the pilot was, as he says, required to give all his attention to make his slip. That made an efficient lookout the more indispensable from that moment onward. The legal obligation of ferry-boats to maintain an efficient lookout has been repeatedly declared, and considering the lives that are endangered through collisions this rule can never be relaxed. *The Monticello*, 15 FED. REP. 474, and cases cited. There was a deck hand whose duty it was

to act as lookout; but it is clear that he was not performing his duty as such, nor in the proper place for performing it, but was under the hood. If he had been doing his duty, the Weehawken would have been seen coming out of her slip and reported three-quarters of a minute at least before the collision. Had she been thus observed and reported at that time, the Pavonia, by reversing her engine at once, instead of waiting until half this interval had passed, would very clearly either have been stopped altogether before the collision, or else would not have reached the place of the collision until the Weehawken had passed by, which would have been accomplished 10 seconds later. Both boats must, therefore, be held in fault, and the damages divided.

THE STANDARD.¹

(District Court, S. D. New York. February 16, 1885.)

1. COLLISION BETWEEN STEAMERS—CROSSING COURSES—SIGNALS.

As the tug M., with three boats lashed to her sides, was coming out of the Kills into New York bay with the ebb-tide, she came into collision with the barge Sweepstakes, in tow, on a hawser, of the tug S., bound down the bay into the Kills. Previous to the collision, the S. gave two whistles, indicating that she would pass to the left, to which the M. responded with two. But the S., after signaling, did not change her course to correspond, or slacken her speed, but with her tow kept a perfectly straight course. The M. changed her course in accordance with her whistles, but very slightly, and stopped and backed, but not in time to avoid collision. *Held*, that both vessels were in fault,—the S., because, having the M. on her starboard hand and being bound to keep out of the way, she did not change her course to correspond with her whistles; the M. for not changing her course earlier than she did, and for not seasonably stopping and backing.

2. SAME—MISCALCULATION OF PILOT.

The ebb-tide out of the Kills and the ebb down the bay meet near the place of collision; and each vessel, as she approached, had the tide in her favor. *Held*, that both pilots doubtless miscalculated the rapidity with which the boats were approaching. But both were familiar with the tides, and both are chargeable for such miscalculation, and for neglect in not taking measures sufficiently early to avoid each other; and consequently the damages must be divided.

In Admiralty.

Benedict, Taft & Benedict, for libelants.

Beebe, Wilcox & Hobbs, for claimants.

BROWN, J. On September 8, 1882, at about half past 10 in the forenoon, as the libelants' steam-tug Monitor, having in tow one boat lashed upon her port side, and two others lashed to her starboard side, was coming eastward out of the Kills with the ebb-tide, when a little to the southward of the Can buoy, (No. 17,) below Robbins' Reef light, she came in collision with the oil-barge Sweepstakes, which was in tow, on a hawser, of the steam-tug Standard, which had just passed the buoy, and was bound down the Kills. The pilot of the

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

Monitor was about half-way between Constable's point and the Can buoy—that is, about half a mile distant from the latter—when he saw the Standard coming nearly straight down the bay, and a little above Robbin's Reef light, with her two barges in tow upon hawsers, one behind the other. The Standard signaled to the Monitor with two whistles; to which the latter replied with two, indicating that they would each go to the left. The evidence shows that the Standard, with her tow, kept a perfectly straight course, without changing her helm or slackening her speed, until the collision happened with her tow. The libelants' testimony is to the effect that the Monitor starboarded her wheel so as to change her heading sufficiently to point inside, or to the westward, of the Can buoy; and that before the collision she reversed her engines. The other evidence in the case satisfies me that the Monitor did not starboard much, or change her course to any considerable extent to the northward. The fact that the Sweepstakes, the aft boat of the Standard's tow, struck all three of the boats which were lashed to the Monitor's side, and the fact that the barge ahead of her was going down the bay upon a S. S. W. course, are utterly irreconcilable with any considerable previous change by the Monitor. The Standard passed the Monitor some 200 feet or more distant from her. The Acme, the first boat of her tow, some 200 feet behind, was passed less than 50 feet distant from the Monitor, while the Sweepstakes, about 150 feet behind the Acme, collided with the Monitor's tow, as above stated.

It is very clear that both boats were to blame for this collision; the Standard, because, having the Monitor on her starboard hand, she was bound to keep out of the way, and yet made no change in her course; and, *second*, because, in giving two whistles to the Monitor, she agreed to pass to the left, and having abundant room to do so, and no obstruction, she did not vary her course, but kept nearer to the Can buoy than was necessary or proper, considering that the only reasonable course for the Monitor was to pass to the eastward of the buoy and not through the narrow channel to the westward of it. The Monitor was equally in fault for not starboarding earlier than she did, and also for not seasonably stopping and backing, which were equally within her power. The peculiarities of the tide there at that time doubtless contributed to the collision. Each, as she approached the other, had the ebb-tide in her favor; the Monitor in coming down the Kills, and the Standard in coming down the bay. These two tides met near the place of collision. The real cause of the collision was doubtless the miscalculation of both pilots as to the rapidity with which they were approaching each other; but both were familiar with these tides, and both are chargeable for such miscalculation, and for not taking in time the measures necessary to avoid each other.

The damages must be divided, and a reference ordered to compute the amount, with costs.

WILLARD, Trustee, v. MUELLER.¹

(Circuit Court, S. D. Ohio, W. D. March 21, 1885.)

REMOVAL OF CAUSE—FEDERAL QUESTION—SECTION 3477, REV. ST.

Complainant brought suit in a state court to subject a judgment, obtained by the defendant against the United States in the court of claims, to the payment of a judgment he had against defendant, and for injunction to restrain defendant from collecting, transferring, or otherwise disposing of said claim against the government, and for the appointment of a receiver to collect and hold the fund. The suit was removed to the United States court, and upon motion to remand, *held*, that the suit involved the construction of section 3477, Rev. St., which declares that all "transfers and assignments made of any claim upon the United States, * * * shall be absolutely null and void, unless they are freely made, and executed in the presence of at least two attesting witnesses," etc., and the motion was therefore denied.

On Motion to Remand.

Long, Avery, Kramer & Kramer, for motion.

Lincoln, Stephens & Lincoln, *contra*.

BAXTER, J. This suit, commenced in the common pleas court of Hamilton, Ohio, was, on the defendant's application, transferred to this court for trial. The removal was under the act of March 3, 1875. The complainant moves here to remand it. The complainant seeks, through the aid of a court of equity, to seize \$22,000, adjudged by the court of claims to be due from the United States to the defendant, and have the same applied in part payment of a judgment for a larger amount which he holds against the defendant. As a basis for this relief he alleges that the defendant has no property subject to execution, and that he is about to assign his said claim on the government, to prevent the complainant and other creditors from subjecting it to the payment of his debts. Wherefore, he prays for an injunction to restrain defendant from either collecting, transferring, or otherwise disposing of said claim, and for the appointment of a receiver to collect and hold the fund subject to the order of the court. Both parties being citizens of Ohio, the motion to remand must prevail, unless the controversy involves some federal question.

The government is not and cannot be made a party to this litigation, and I presume would not respect any order which the court might make, directed to the officer charged with the duty of paying the defendant's claim. Whether it would recognize an assignment or power of attorney executed by the defendant under judicial coercion to the court's receiver, is not important to this inquiry. It is certain that a decree compelling the defendant to assign his claim or to execute a power of attorney, authorizing its collection, is the only possible way for the court to obtain possession and control of the money sought to be reached. But the defendant contends that he is protected against

¹Reported by Harper & Blakemore, Esqs., of the Cincinnati bar.

any such decree by the 3477th section of the Revised Statutes, which declares that all "transfers and assignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of such claim, or any part thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of the warrant for the payment thereof."

The complainant's counsel responds that he has invoked no such relief; that he has not asked for a decree either to compel an assignment or the execution of a power of attorney. We concede that he does not expressly pray for this specific relief. But such relief is within the scope of his bill, and included in his prayer for general relief. The controversy, therefore, necessarily involves the consideration of the foregoing enactment. The defense arises under it, and the defendant has the right, under the act of March 3, 1875, to have the questions thus raised passed upon by this court. It follows that in the judgment of this court the transfer of the case from the state to this court was proper, and the motion to remand will be disallowed.

"A case in law or equity consists of the right of one party as well as of the other, and may properly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege or claim or protection or defense of the party, in whole or in part, by whom they are asserted."¹

"If a federal law is to any extent an ingredient of the controversy by way of claim or defense, the condition exists upon which the right of removal depends, and the right is not impaired because other questions are involved which are not of federal character."²

That the "right, privilege, claim, protection, or defense," under the constitution and laws of the United States, is well taken, is not the criterion of jurisdiction. In action against a railway company for unjust discrimination in its tolls, it defended on the ground that the statute under which the plaintiff sought to recover impaired the obligation of the contract contained in its charter. Judge DRUMMOND said: "The only point we can consider here is whether there appears to be such a question in the case, not whether the immunity claimed by the defendant can be sustained. * * * The only question is whether such a claim can be fairly made under it, so as to raise a constitutional question."³

It is not sufficient that it is *claimed* that the case raises a federal question.

¹ Railroad Co. v. Mississippi, 102 U. S. 135. HARLAN, J.

² W. U. Tel. Co. v. National Tel. Co. 19 Fed. Rep. 561, WALLACE, J.; Frank G., etc., Co. v. Larimer, 8 Fed. Rep. 724; Mayor v. Independent Steam-boat Co. 22 Fed.

Rep. 801; Rothschild v. Matthews, Id. 6; Van Allen v. Railroad Co. 1 McCrary, 598; S. C. 3 Fed. Rep. 545; Connor v. Scott, 4 Dill. 242.

³ People of Ill. v. Chicago, B. & Q. R. Co. 16 Fed. Rep. 706.

The court must be satisfied that such question fairly arises out of the controversy. If the court finds the claim unfounded, the case will be remanded.¹

The fact that the title of the thing in dispute is derived from the United States does not of itself make the question one of federal jurisdiction.²

Section 3477, Rev. St.: "No language could be broader or more emphatic than these enactments. * * * The statute strikes down and denies any effect to powers of attorney, orders, transfers, and assignments which before were good in equity."³

Assignments in bankruptcy, by descent or devise, or voluntary assignments under the state insolvent laws, have been held to be good.⁴—[REPS.]

¹ Mayor v. Independent Steam-boat Co. 22 Fed. Rep. 801; Rothschild v. Matthews, Id. 6.

³ U. S. v. Gillis, 95 U. S. 407, 413, 414; Spofford v. Kirk, 97 U. S. 484-488.

² Hoadley v. San Francisco, 94 U. S. 4; Albright v. Teas, 106 U. S. 618; S. C. 1 Sup. Ct. Rep. 550.

⁴ U. S. v. Gillis, 95 U. S. 407; Erwin v. U. S. 97 U. S. 392; Goodman v. Niblack, 102 U. S. 560.

ADAMS v. COMMISSIONERS OF REPUBLIC CO.

(Circuit Court, D. Kansas. March 3, 1885.)

1. CIRCUIT COURT—JURISDICTION—SUIT ON COUNTY WARRANTS.

County warrants, signed by the chairman of the county commissioners and county clerk, directing the county treasurer to pay to bearer a certain sum, for certain services stated therein, are negotiable and pass from hand to hand and not by assignment, and therefore do not come within the restriction of jurisdiction in the first section of the act of congress of March 3, 1875.

2. SAME—CITIZENSHIP—DEFENSES.

The holder of such warrants, being a citizen of another state, may sue thereon in this court, although the original payee is a citizen of this state but subject to all defenses which existed against them in the hands of the first holder.

At Law.

G. C. Clemens, for plaintiff.

Irwin Taylor, for defendants.

FOSTER, J. This is an original action brought in this court on county orders or warrants, amounting to \$1,000, with interest from September 15, 1873, issued by the defendant county on the date aforesaid. The petition alleges that the orders were issued to the King Bridge Company, and that plaintiff is now the owner and holder of the same, and that he is a citizen of the state of Pennsylvania, and the defendant is a municipal corporation of the state of Kansas. The answer sets up several matters of defense, and plaintiff replies thereto, and defendant demurs to this reply, assuming that the demurrer relates back to the petition. The first question presented is a question of jurisdiction: the question whether the averments in the petition make a case cognizable in this court. The defendant claims that, inasmuch as the King Bridge Company, the party to whom these warrants were issued, could not maintain this action, not being a citizen of another state, that the plaintiff who holds them by transfer cannot,

as this kind of paper does not come within the exception named in the first section of the act of March 3, 1875. The petition makes no averment as to the citizenship of the King Bridge Company, to whom the orders were issued, which is a material averment to be made, if this suit is founded on contract in favor of an assignee, unless this paper is held to come under the designation of promissory notes, negotiable by the law-merchant, or bills of exchange, in which case the citizenship of the original payee or assignor would become immaterial. It has been repeatedly decided by the supreme court that the bill or complaint must aver the facts necessary to confer the jurisdiction in the federal court. *Turner v. Bank*, 4 Dall. 8; *Dred Scott Case*, 19 How. 401; *Godfrey v. Terry*, 97 U. S. 171; *Robertson v. Cease*, Id. 646; *Grace v. Insurance Co.* 109 U. S. 278; S. C. 3 Sup. Ct. Rep. 207; *Corbin v. County of Black Hawk*, 105 U. S. 667.

The orders sued upon read as follows:

"No. —.
\$100.00

COUNTY CLERK'S OFFICE, REPUBLIC COUNTY,
BELLEVILLE, KAN., September 15, 1873.

"Treasurer Republic county pay to King Bridge Company, or bearer, the sum of one hundred dollars, on account of services erecting bridge at New Scandinavia, Kansas, as allowed by the board of county commissioners of Republic county.

J. H. FRINT, Chairman.

"Attest: SAMUEL W. SKEELS, County Clerk."

The act of March, 1875, § 1, provides as follows:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant, and bills of exchange."

The act of 1789 declares that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of any assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. Section 629, Rev. St. 110.

Under this provision of the latter act it was repeatedly held by the supreme court that the restriction of jurisdiction did not apply to notes and other obligations that were payable to bearer and passed from hand to hand, but was limited to such notes and choses in action as passed by assignment or indorsement. *Bank of Kentucky v. Wister*, 2 Pet. 326; *Bushnell v. Kennedy*, 9 Wall. 391; *City of Lexington v. Butler*, 14 Wall. 293. Since the act of 1875 this rule has been adhered to and applied to that act. *Thompson v. Perrine*, 106 U. S. 592; S. C. 1 Sup. Ct. Rep. 564, 568; *Chickaming v. Carpenter*, 106 U. S. 666; S. C. 1 Sup. Ct. Rep. 620.

The later cases were suits upon municipal bonds and coupons, and the question remains whether these county warrants or orders come under the same rule. It is urged by the defendant that they are not

promises to pay; that the holder cannot bring a suit upon them; that they are in no sense negotiable paper; and that they can only pass by assignment, and not from hand to hand by delivery. Now, it so happens that the supreme court has given the negative to each of these propositions. In *Mayor v. Ray*, 19 Wall. 478, and *Wall v. Monroe Co.* 103 U. S. 77, the supreme court has clearly fixed and established the character of this kind of paper, and the rights of the holder thereof. And, *first*, it is decided that these warrants are negotiable and transferable by delivery or indorsement; when payable to bearer, they pass by delivery from hand to hand; *second*, that the holder may base an action on them in his own name to recover the amount; *third*, that they are *prima facie* evidence of the debt, but the holder takes them subject to all defenses existing against them in the hands of the original holder. In the case last cited, the court say:

"They establish *prima facie* the validity of the claims allowed, and authorize their payment. * * * The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them, and to maintain in his own name an action upon them. * * * The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of the original payees."

The jurisdiction of the court was not challenged in these cases, although the facts as to the issue and transfer of the warrants were quite similar to those in the case at bar.

The supreme court having thus declared the rights of the holder of such paper, we need not examine any decisions of the state courts on that question. They are negotiable; they pass from hand to hand; they are *prima facie* evidence of the debt; and the holder may bring suit on them in his own name. It seems to me that this brings them very clearly within the rule of *Thompson v. Perrine* and *Chickaming v. Carpenter, supra*; and the plaintiff is not the assignee of a contract or chose in action within the acts of 1875 and 1889. It seems that the *bona fide* holder takes these warrants very much like a purchaser of a negotiable note after due,—subject to all defense. But it would hardly be claimed that the purchaser of a negotiable note after due could not sue in this court unless the payee could have done so. The act of 1875 speaks of promissory notes *negotiable by the law-merchant*. A simple note payable to a particular person, or bearer, or order, is negotiable by the law-merchant.

Now, supposing a citizen of Kansas makes to another citizen of Kansas such a negotiable note for \$501, and a citizen of Missouri becomes the *bona fide* owner and holder of it, and brings a suit against the maker in this court, could it be urged as a defense that he bought it after due, and therefore this court had no jurisdiction? Certainly not. If the fact pleaded was true, it would simply subject the plaintiff's claim to all legal and equitable defenses which could have been made had the suit been brought by the original payee. He would hold it just as the supreme court decides the holder of these warrants holds

them,—subject to all defenses; but that is not the test of jurisdiction of this court.

In this case the answer sets out certain matters of defense, and, among others, that the bridge built, for which these warrants were issued, was a private bridge, built and owned by said King Bridge Company, and not for the county. The reply is—*First*, a general denial; and, *second*, a special denial of the before-named averment in the answer, and the counter-allegation that the bridge was built for the county, and was accepted by it, and has been in the constant use and occupation of said defendant, etc. The plaintiff pleads this matter for the purpose of claiming an estoppel against the county; but as it is no more or less than a special denial and counter-allegation of matter set up in the answer, without passing upon the question of estoppel, it seems to me the reply is not demurrable for that cause.

BREWER, J., concurring.

NEW CASTLE NORTHERN R. CO. v. SIMPSON.

(Circuit Court, W. D. Pennsylvania. March 9, 1885.)

1. RAILROAD COMPANY—CONSTRUCTION CONTRACT ULTRA VIRES—COMPENSATION OF CONTRACTOR.

A court of equity, at the instance of a railroad company, having set aside a construction contract as *ultra vires*, held, that the corporation must account for benefits received from partial performance, and that the contractor was not to be put off with a bare reimbursement of his actual outlay, but was entitled to receive for what he had done such compensation as any other railroad contractor could recover therefor, in the absence of express agreement as to price.

2. SAME—INTEREST CHARGEABLE.

Held, further, that the corporation was justly chargeable with interest on the amount found to be due the contractor when the work was stopped.

In Equity. Sur exceptions to master's report.

J. B. Brawley and R. B. McComb, for exceptant.

D. B. Kurtz and Marshall Brown, contra.

ACHESON, J. The established rule in equity is that a corporation is accountable for benefits which it has received under an *ultra vires* transaction. Green's Brice, *Ultra Vires*, 717. Hence, in holding that the defendant's compensation for the materials furnished and work done by him should be measured by what it would have cost the plaintiff company to employ a responsible contractor to provide the same materials and perform the same work, the master, I think, adopted a just standard. While the defendant is not under any guise to receive damages for the loss of his bargain, yet he is not to be put off with a bare reimbursement of his actual outlay. He is entitled to be paid for what he has done fair rates, such as any other railroad

contractor might have recovered therefor, in the absence of express agreement as to compensation. The above rule excludes all the losses and expenses specified in the defendant's exception, and the master was clearly right in disallowing them.

I cannot say that the master erred in adopting, in the main, the estimate of Charles E. Fink, as to the values of the materials furnished and work done. The master had the advantage of seeing and hearing the witnesses, and every presumption is to be made in favor of the correctness of his conclusions upon questions of fact. Besides, compared with the estimates of the other witnesses, it is not evident that Mr. Fink's values are excessive. In so far as the exceptions allege mistakes committed by the master in respect to the quantities of materials furnished and amount of work done, they do not seem to me to be well founded. The plaintiff's fifth and sixth exceptions go to the allowance to the defendant of the *value* of that part of the work done by Weaver (a subcontractor under Reed) before the date of the defendant's contract, instead of what the defendant actually *paid* therefor. The fact is that the defendant took the Weaver contract off Reed's hands, and paid for all the work done by Weaver. Hence the master was of opinion that the defendant is entitled to receive the value of the whole of that work. Now, even if this view is a questionable one, still, it seems to me that there is another ground for sustaining the master in this particular. He was not furnished with any evidence whereby he could distinguish between the work done by Weaver before the date of the defendant's contract, and that done by him afterwards. He was therefore obliged to treat the work as a whole, under the proofs as submitted to him.

In fixing the value of the materials for the unfinished bridge, I am not convinced that the master has erred. But it is not so clear to me that Mr. Youtz may not have a claim thereon. The transaction was not a sale by him of bridge materials, but a contract whereby he undertook to build a bridge, furnishing the materials. Now, in the performance of the contract he has been interfered with; and it may be that his title to the unused materials was not extinguished. Hence the defendant should be required either to deliver to the plaintiff an acquittance from Mr. Youtz, or give security to indemnify the plaintiff from any claim he may have on account of said materials. This, however, can be provided for in the final decree.

Notwithstanding the few changes made by the master, the result shows that substantially he adopted Mr. Fink's estimate, the details of which appear in the defendant's Exhibit A. Now, in view of the friendly relation existing between the two, it is a reasonable conclusion that Mr. Fink's estimate does the defendant full justice. Beyond question that estimate includes a general contractor's profit. Indeed, the doubt in my mind is whether the profit thus allowed is not too liberal. In some particulars it strikes me as extreme. For example, Weaver was paid for earth excavation 23 cents, and for loose

rock and hard-pan 40 cents per cubic yard; yet for this identical work Mr. Fink allows the defendant 35 cents and 75 cents. For other earth excavation the defendant himself did, he is allowed 50 cents per cubic yard. If Mr. Fink thought the defendant was entitled to anything further, surely he would have set it forth in his carefully prepared estimate. When, under examination as to the rates fixed by him for work done and materials furnished, he recognizes such rates to be at a "fair market value," a "fair market contract price," a "fair contract price," etc. Nevertheless the master has added to his estimate of \$52,233.42, 10 per centum. Undoubtedly the witnesses generally do say that a percentage is to be added to their several estimates, and the master fell in with this current of testimony. Mr. Fink, however, speaks very guardedly of augmenting *his* estimate by any additional percentage. When pressed by the defendant's counsel he did finally express the opinion that there should be such allowance, but he put it on the ground of supposed injurious delays in the work, for which the railway company was responsible. But of such delays between October 8, 1883, when the defendant began work, and December 15, 1883, when the bill in this case was filed, I find no satisfactory evidence. When the bill was filed it amounted to an election on the part of the company to rescind the construction contract as *ultra vires*, and thereafter the company was not answerable for delays. Especially was it not responsible (as Mr. Fink evidently assumed) for any interruption of the work consequent upon the preliminary injunction granted by the court of common pleas. It is true, this court modified that injunction so as to leave the defendant free to go on with the work if he saw fit to take the risk; but this was done chiefly because it was represented that the unfinished work was in such a state as to require immediate attention on the part of the contractor. Upon the whole I feel constrained to sustain the plaintiff's exception (No. 24) to the master's allowance of 10 per centum upon his general estimate.

For the reasons stated by the master, the item of \$556.69, for engineering expenses, is, I think, a proper charge against the railway company.

Finally, I am of opinion that the plaintiff company is justly chargeable with interest on the amount found to be due to the defendant when the work was stopped. Green's Brice, *Ultra Vires*, 728. No equitable reason appears for denying interest. It is not shown or pretended that the company ever made a tender of money to the defendant, or set apart or kept on hand a fund to pay him. The result, then, reached by the court, after a very careful consideration of the case, is that the only exception to be sustained is the one relating to the allowance of 10 per centum upon the master's estimate.

And now, March 9, 1885, all the exceptions to the master's report are overruled, save the twenty-fourth exception filed by the plaintiff, which is sustained.

MORRISON v. PRICE, Receiver.

*(Circuit Court, D. Massachusetts. March 14, 1885.)***NATIONAL BANKS—INDIVIDUAL LIABILITY OF STOCKHOLDERS—VOLUNTARY ASSESSMENT—INCREASE OF CAPITAL.**

The Pacific National Bank of Boston was organized in October, 1877, with a capital of \$250,000, with the right to increase it to \$1,000,000. In November, 1879, its capital was raised to \$500,000; September 13, 1881, the directors voted to increase the capital to \$1,000,000. On November 18, 1881, the bank suspended. On December 13, 1881, the directors voted that as \$38,700 of the increase of capital stock had not been paid in, the capital be fixed at \$961,300, and the comptroller of currency was notified to that effect, and he notified the bank, under Rev. St. § 5205, to pay a deficiency on its capital stock by an assessment of 100 per cent. At the annual meeting the assessment was voted, and on March 18, 1882, with consent of the comptroller and the approval of the directors and the examiner, the bank resumed business, and continued until May 20, 1882, when it again suspended and was put in the hands of a receiver. Prior to May 20, 1882, \$742,800 of the voluntary assessment had been paid in. Complainant was the owner of 25 shares of stock on September 13, 1881, and after the vote to increase the stock, took 25 shares, for which he paid \$2,500, on October 1, 1881, and received a certificate. He voted for the assessment at the annual meeting, and in February, 1882, paid the assessment on the old and new stock, and subsequently sought to enjoin the suit at law against him by the receiver, to enforce his individual liability as a stockholder, under Rev. St. § 5151, on the ground that the increase of capital was illegal and void, and that the voluntary assessment under Rev. St. § 5205, relieved the stockholders of individual liability. *Held*, that he was not entitled to relief, and the bill should be dismissed.

In Equity.

A. P. Gould and B. N. Johnson, for complainant.

A. A. Ranney, for defendant.

COLT, J. This is a suit to restrain the further prosecution of an action at law brought by the defendant, as receiver of the Pacific National Bank, against the complainant, to recover an assessment made under the direction of the comptroller of currency, for the purpose of enforcing the individual liability of the stockholders under section 5151, Rev. St. The Pacific National Bank of Boston was organized in October, 1877, under the national banking law. Its capital was \$250,000, with the right of increase to \$1,000,000. In November, 1879, the capital was raised to \$500,000. On September 13, 1881, the directors voted to increase the capital to \$1,000,000. On November 18, 1881, the bank suspended, and Daniel Needham was appointed examiner. He took possession of the bank, and remained in charge until it reopened, March 18, 1882. On December 13, 1881, the directors passed the following vote:

Voted that whereas, it was voted by this board, on the thirteenth day of September last, that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

And whereas, the stockholders were duly notified of said vote, and also that subscriptions to the new stock would be payable October 1st;

And whereas, \$461,300 of said new stock has been taken and paid in;

And whereas, \$38,700 thereof has not been taken and paid in;

Voted that said \$38,700 of said stock be and is hereby canceled and deducted from said capital stock of \$1,000,000, and that the paid-up capital stock of this association amounts to \$961,300.

Voted that the comptroller of the currency be notified that the capital of this association has been increased in the sum of \$461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association, according to law.

The comptroller having received notice of the increase of the capital stock in the sum of \$461,300, and that the whole amount had been paid in, duly certified his approval of such increase on December 16, 1881. On the same day he notified the bank, under section 5205, Rev. St., to pay a deficiency on its capital stock by an assessment of 100 per cent., its entire capital stock having been lost; and in case the deficiency was not paid, and the bank refused to go into liquidation for three months after the notice was received, then a receiver would be appointed. At the annual meeting of the stockholders of the bank, on January 10, 1882, an assessment of 100 per cent. on the stock was voted. With consent of the comptroller, and the approval of the directors and examiner, the bank, on March 18, 1882, reopened its doors, and continued to do a general banking business until May 20, 1882, when it again suspended, and was thereupon put in charge of the defendant receiver. Prior to May 20, 1882, the sum of \$742,800 of the voluntary assessment voted by the stockholders at the January meeting had been paid.

The complainant, on September 13, 1881, was the owner of 25 shares of stock. After the vote of the directors on that day, to increase the capital to \$1,000,000, he took new stock to the amount of 25 shares, for which he paid \$2,500 on October 1, 1881, and soon after received a certificate. He was present at the stockholders' meeting, January 10, 1882, and voted for the assessment. In February, 1882, he paid the assessment of 100 per cent. on the old and new stock. He now seeks to enjoin the further prosecution of the suit at law, brought against him by the receiver, to enforce his individual liability as a stockholder under the statute, on several grounds. He claims that the increase of the capital stock from \$500,000 to \$961,300 was illegal and void. By its charter the capital of the bank might be increased to \$1,000,000. By section 5142, Rev. St., the whole amount of increase must be first paid in, and the certificate of the comptroller specifying the amount of increase, and his approval thereof, obtained. It appearing that the increase was not in excess of the limit imposed by the charter of the bank, and that it was paid in, and the proper certificate obtained from the comptroller, we see no valid ground for declaring that the increase was *ultra vires* or void. It was within the power of the corporation, and the statutory requirements were complied with.

The case of *Scovill v. Thayer*, 105 U. S. 143, does not apply, be-

cause there the corporation attempted to increase its capital beyond the amount prescribed by its charter, and the court held that there was no implied power in a corporation to change the amount of its capital stock as limited by its charter, and that all attempts to do so are void. The court then proceeded to affirm the well-settled distinction between an issue of stock which is clearly *ultra vires*, and an issue which is attended with informalities or irregularities as to the mode or manner of issue, but which is within the corporate powers. In the former case only is the stock void. In the latter case it is not. *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, Id. 56; *Chubb v. Upton*, 95 U. S. 665.

Upon the facts here presented the most that can be claimed is that the proceedings in respect to the increase were not regular. The vote of the directors on September 13, 1881, was to increase the capital to \$1,000,000, and this notice was sent to each stockholder, and the privilege given, as the charter provides, of subscribing for the new shares in proportion to the amount of old stock owned by the stockholder. Subsequently it was found that \$38,700 of the new stock had not been taken, and so the directors, on December 13, 1881, voted to make the increase \$461,300, and to this increase the comptroller gave his consent. The point is taken that the vote of December 13th was a vote to reduce the capital stock from \$1,000,000 to \$961,300, and that to do this under the law required the consent of two-thirds of the stockholders, and the approval of the comptroller. Section 5143, Rev. St. If there had ever been a legal increase of the capital to \$1,000,000, there would be some force in this argument; but the capital stock of the bank never was \$1,000,000. The first step had been taken to make it that sum, but the amount had not been paid in, and the comptroller had not given his approval. In the absence of these necessary requirements the capital of the bank remained \$500,000, until it was increased to \$961,300. It cannot be said that the vote of December 13th was for a reduction, because you cannot reduce a capital which never existed. In our opinion, section 5143 has no application to the facts before us, since at no time was the capital of the bank \$1,000,000. The vote of September 13th, taken in connection with that of December 13th, followed by the action of the comptroller, established the legal capital of the bank at \$961,300.

But it is urged with more force that the stockholders, after the action by the directors on September 13th, subscribed to an increase of \$500,000, and that they paid for their new stock and received certificates on the basis of such an increase; in other words, that this was their contract with the corporation, and the only contract by which they are bound. But here, in view of what afterwards took place, comes in the principle of estoppel. It was clearly the duty of each stockholder, as soon as he discovered that the increase was less than what he subscribed for, to repudiate his contract and decline to hold

the new stock. But it surely would be contrary to every equitable principle to hold that a stockholder could retain his new stock without protest after notice, vote upon it at a stockholders' meeting, pay assessments upon it that the bank might reopen, allow the bank in reopening to hold itself out to the world as possessing a capital of \$961,300, such capital being a trust fund for the benefit of all creditors, and then, when the bank subsequently passed into the hands of a receiver, to seek for the first time to avoid his liability on the new stock, as against the general creditors of the corporation, on the ground that his contract with the corporation called for an increase of \$500,000, while the actual increase was only \$461,300. Supposing this new stock had proved profitable, undoubtedly the complainant would have reaped the benefit. Stockholders should not be permitted to deny their liability in case of loss, when they would have shared in the benefits in case of profit. *Sanger v. Upton, supra*.

It would seem that the supreme court take the view that it is not necessary to support an action against a stockholder by the corporation or its assignee; that there should have been a subscription for the whole number of shares named in the articles of association. *Chubb v. Upton, supra*. But where the doctrine prevails that a stockholder is not liable upon his subscription for stock unless the whole amount is subscribed, the principle is recognized that if, knowing the requisite subscription has not been made, he attends the meetings of the corporation, and co-operates in the votes for spending money and making contracts, he is estopped from setting up this defense. *Cabot & West Springfield Bridge v. Chapin*, 6 Cush. 50.

The objection is made that the stockholders were misled as to the condition of the bank when they subscribed for the new stock, and in their subsequent acts in relation thereto. Undoubtedly gross irregularities were committed by some of the officers of the bank before its first suspension in November, 1881. But the subsequent efforts of the directors to revive the bank seem to have been made with an honest intent. If the directors were mistaken as to what proved to be the real value of the assets, so were the examiner and comptroller, as well as the great body of stockholders who attended the meeting of January 10th; and, after considering an exhaustive report showing the condition of the bank, decided to vote an assessment of 100 per cent. on their stock, in the belief that this would make the bank solvent, and enable it to continue business. But whether or not misrepresentations were made by the directors, it cannot affect the liability of the stockholders upon their stock as against general creditors of the corporation. It is well settled that in an action by an assignee to recover unpaid subscription upon stock, the defense of false and fraudulent representations inducing such subscription cannot be set up; especially when the subscriber has not been vigilant in discovering such fraud and in repudiating the contract. And the same principle must be held to apply to a suit by a

receiver to enforce the individual liability of the shareholder, under section 5151. *Chubb v. Upton*, *Upton v. Tribilcock*, and *Sanger v. Upton*, *supra*; *Ogilvie v. Knox Ins. Co.* 22 How. 380.

In controversies between stockholders and third parties, it is well to bear in mind that a corporation is but the representative of its stockholders; that it exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect; and when the interest of the public, or of strangers dealing with the corporation, is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally or inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled, so far as it may inequitably affect him. *Sawyer v. Hoag*, 17 Wall. 610, 623.

But another ground of defense is taken, and carefully and thoroughly set out in complainant's brief. Upon the principle of equitable performance, or satisfaction, or set-off, it is maintained that the voluntary assessment of 100 per cent. by the stockholders to restore the impaired capital stock, under section 5205, should be held to relieve them of their individual liability as stockholders under section 5151. Hard as it is upon the stockholders to pay another 100 per cent., there is a fatal objection to the application of any of the equitable principles sought to be invoked. The capital stock of a corporation is a trust fund for the benefit of all creditors. It is pledged to those who deal with the corporation for their security. The individual liability of the stockholder, under the statute, is as much a part of this pledge, and a part of the assets of the company for the payment of debts, as the capital stock. *Sanger v. Upton*, *supra*. The statute says the shareholders are liable for "all contracts, debts, and engagements" of the association, to an extent equal to the amount of their stock at its par value. Admitting that the January assessment went to pay certain debts, yet that can in no proper sense be held to be a satisfaction of the lien which all the creditors have upon the capital stock, and the fund derived from the personal liability of the stockholders. There is no equitable principle by which one can fulfill his obligation to a class by the payment in any form of a part of that class to the exclusion of the rest. The double benefits which equity abhors must be to the same recipients, but we cannot conceive how the payment of some creditors in full can be an equitable satisfaction of the legal claims of other creditors who consented to an extension to save the bank, and of new creditors who made deposits after the bank resumed.

The purpose of the voluntary assessment was to restore the impaired capital stock, in order that the bank might reopen. The only alternative was for the bank to pass into the hands of a receiver. The

stockholders decided to levy the assessment. This may have been bad judgment, but general creditors cannot suffer for that reason. If the reorganization of the bank had proved successful, the stockholders might have saved their property. The assessment was voted, the greater part paid in, and the bank reopened. From this time new rights and equities intervened. It is no answer to the rightful claims of new creditors to enforce, through a receiver, the statutory liability of stockholders to say that the assessment went to pay old debts. Suppose the bank had continued business for 10 years, instead of two months, and had paid off all its old liabilities, and incurred new ones; surely the stockholders could not get rid of their individual liability by setting up that, 10 years before, there was paid an assessment of 100 per cent., which went to liquidate certain claims against the bank. If the bank had not reopened, and the assessment had passed into the hands of the receiver, the situation might be different. It might then be claimed with more reason, that, though the assessment was paid for the purpose of restoring the stock, and enabling the bank to continue, it had not been devoted to that purpose, but, having passed into the hands of the receiver, it could be used for the payment of general creditors, and it should therefore be regarded as an equitable performance of the statutory liability. But here the assessment was used for the very purpose for which it was made. It went to restore the impaired stock, and thus enable the bank to reopen. To be sure, it was used to pay some debts, because that was incidental to restoring the stock, but it did not go to pay all debts.

In our opinion, this assessment, made under another section of the statute, and for a different purpose, cannot, on any legal or equitable ground, be held to relieve a stockholder from his individual liability under section 5151. The question whether a bill in equity will lie to restrain a suit of this character was not pressed at the hearing; but, independent of this consideration, our conclusion is that the bill must be dismissed.

Bill dismissed.

McGRIFF, Trustee, etc., v. BALDWIN and others.¹

(Circuit Court, S. D. Georgia, W. D. January 23, 1885.)

EQUITY PRACTICE—EXECUTION ISSUED ON DECREE—POWER OF THE COURT TO PREVENT ABUSE OF PROCESS.

An execution was issued upon a decree. The defendant filed an affidavit of illegality, (a remedy permitted by the state law,) suggesting various grounds upon which the execution was alleged to have been illegally issued, levied, and advertised. Upon motion made by the plaintiff to the execution to dismiss the affidavit of illegality, *held*, that the same might be regarded as a statutory remedy adopted by the rule of this court, or as a motion or petition supported by the affidavit, and the same would be retained for a hearing.

¹Reported by W. B. Hill, Esq., of the Macon bar.

In Equity.

Baldwin, Starr & Co. filed their bill in 1868 against McGriff, as trustee of Sarah M. Ryan, to subject her trust estate to a debt in their favor. The pleadings showed that her trust estate was created under a marriage settlement by which Mrs. Sarah M. Ryan was made tenant for life of certain property, with remainder to her children. The property was acquired by Mrs. Sarah M. Ryan (formerly Taylor) under will of her mother, by which, also, the property so acquired was charged with a certain debt in favor of William M. Snell, amounting to \$2,800. In 1874 the cause was referred to a master and he was directed to report what portion of the debt sued on was chargeable to, and to be paid out of the rents and income of, said Sarah M. Ryan's trust estate. Afterwards, and before any hearing was had before the master, Sarah M. Ryan, the life tenant, died. McGriff, the trustee, and also the remainder-men and said Snell, who had an interest in said land, regarded said bill as at end by reason of the death of said Sarah M. Ryan. None of them had any notice of the hearing by the master, or of his report, or of the final decree, which was taken against McGriff, as trustee of Sarah M. Ryan, several years after her death, and after the remainder-men and said Snell had effected a partition of said lands in the state court and were in possession of their respective shares. The decree was taken against the entire property, as the property of Sarah M. Ryan, and execution issued on said decree was levied on said land, and the entire fee therein advertised for sale.

The defendant, Thomas J. McGriff, trustee, filed an "affidavit of illegality" in accordance with the state statute, alleging substantially (1) that he and the parties at interest had no notice of the hearing of said case by the master, and was not there represented by counsel, nor did he have notice nor was he represented when said decree was taken; but well knowing that Sarah M. Ryan's death extinguished the trust estate against which the bill was proceeding, and having received no notice as aforesaid of said proceedings, he believed the whole case abandoned, and never heard of the master's report or decree until the execution was levied. He submitted that a decree taken against the trust estate of a deceased life-tenant was wholly void. (2) The affidavit alleged that the execution was proceeding illegally because the advertisement misdescribed the property, failed to follow the decree, no notice of the levy was given as required by law, the sale was advertised to occur at the wrong place, etc.

The case was heard upon a motion to dismiss the affidavit of illegality, the sole ground urged being that this remedy was inappropriate; that defendant had no remedy except a bill of review.

Bacon & Rutherford and E. F. Best, for Baldwin, Starr & Co.

Hill & Harris, for McGriff, trustee.

SETTLE, J., (*orally.*) I could find support for the conclusion I have reached in this case in the rule adopted by this court in reference to

the remedy known in the state laws as "an affidavit of illegality," this being a mode by which a defendant in an execution may set up grounds showing that an execution has issued or is proceeding illegally. Code, § 3664. The rule referred to is the forty-third rule of this court, and is as follows: "In cases of illegality, the marshal shall observe the rules applicable to sheriffs in like cases." It is conceded that the sheriff in a "like case" would be bound to accept an affidavit of illegality, and arrest the sale under the execution. Code, § 4215. But I do not think it necessary to place the decision upon this ground. The following considerations have most weight with me in leading to the conclusion reached, which is to refuse the motion to dismiss the paper filed as an affidavit of illegality.

Here is a writing, by whatever name it be called, by which it is shown to the court of equity that its own decree and process, issued upon its decree, are about to be abused, and injustice is about to result. The property of certain remainder-men, whose interest has now vested, and of a third party who claims under a paramount title, is about to be sold, as alleged, under an execution against the estate of a life-tenant in the said property, who was dead when the decree was issued, and whose estate perished with her death. Whether this pleading now before the court be treated as an affidavit of illegality, or as a motion supported by that affidavit, which is my inclination, I am satisfied that the court has such power over its own decree and its own process as to suspend the enforcement thereof until a hearing can be had on the case made. If the information that its process was about to be abused was brought to the knowledge of the court by its own officer, I am not sure but that it would even then be the right and duty of the court to check that abuse, and prevent injustice, *ex suo mero motu*.

It is said that the only remedy in a case like this is the bill of review. I do not think so. The supreme court have virtually held that in matters of this character the form of the proceeding is less important than the substance of the right; and that in some instances mere motions, supported by affidavit, are the most appropriate modes of relief. *Krippendorf v. Hyde*, 110 U. S. 276; S. C. 4 Sup. Ct. Rep. 27. If there were no remedy in a case of this kind, nor alleged to exist, it would be the right and duty of the court to frame one.

LEHIGH VALLEY COAL CO. v. HAMBLÉN and others.

*(District Court, N. D. Illinois. March 9, 1885.)***1. TRADE NAME—FOREIGN CORPORATION—CORPORATION ASSUMING SAME NAME—INJUNCTION.**

A United States circuit court cannot interfere by injunction, at the instance of a corporation organized under the laws of another state, and prevent any necessary step from being taken, under the statute of the state in which such court is located, in the creation of a corporation bearing the same name as the foreign corporation.

2. SAME—RELIEF, WHEN GRANTED.

Whether relief could be granted after the creation of the corporation, and use of the name of the foreign corporation in fraud of its rights, is not determined.

In Equity.

F. Ullmann, for complainant.

Beck & Roberts, for defendants.

GRESHAM, J. The complainant company was organized under the laws of Pennsylvania, in 1875, for the purpose of mining anthracite coal in that state, and selling the same there and elsewhere. It owns valuable coal mines in Pennsylvania, and does a large and lucrative business. For a number of years it has had an extensive and profitable business in the west and north-west; and for convenience in the management of that business it has maintained an agency at Chicago, where it owns real estate, including a dock worth \$200,000, and has on hand coal worth \$400,000. The defendants in this suit, wishing to create a corporation in Illinois bearing the same name as the complainant, to carry on the same business, filed their articles of association with the secretary of state on the twenty-sixth of December, 1884, under the general laws of Illinois authorizing the creation of corporations. The secretary of state thereupon issued to the defendants a license as commissioners to open books for subscription to the capital stock of the new corporation, to be known as the Lehigh Valley Coal Company. This suit was brought to prevent the defendants, by injunction, from receiving stock subscriptions, or taking any other steps necessary to be taken under the statute, in the creation of the new corporation.

The object of the defendants in causing an Illinois corporation to be created, bearing the same name as the complainant company, is obvious. They hope, by this means, to secure the benefit of part, at least, of the patronage which the complainant has acquired. Unwilling to engage in open, manly competition with the complainant and others carrying on the same business, the defendants resort to a trick or scheme whereby they hope to deceive the public, and obtain an unfair advantage of the complainant. Such conduct might be fairly characterized more harshly; and it is with extreme reluctance that I deny the complainant the relief prayed for.

The complainant is a foreign corporation, and it is only by comity

that it is doing business in Illinois at all. The state can say to it any day, "Go!" and it must go. That being so, I do not see that the complainant has a legal right to say a corporation shall not be created in Illinois bearing its (the complainant's) name. If the state of Illinois may create a corporation bearing the same name as the complainant,—and it certainly can,—this court has no right by injunction to prevent anything from being done under the state law which is necessary in the creation of such a corporation. The commissioners perform a function under the laws of the state in the formation of the corporation. If they are not officers of the state they are instrumentalities employed by the state. If they can be enjoined from receiving stock subscriptions under the license issued to them by the secretary of state, I do not see why the latter might not be enjoined from issuing a license, or doing anything else under the state statute. The general law authorizing the secretary of state to issue a license to commissioners to receive stock subscriptions provides that no license shall be issued to two or more companies having the same name. Before bringing this suit the complainant should have brought to the attention of the secretary of state the matters alleged in the bill. He might, on a proper application, have revoked the license to the defendants, unless they adopted another name for their company. I do not think this court can interfere by injunction, at the instance of a foreign corporation, and prevent any necessary step from being taken under the statute of this state in the creation of a corporation.

I do not say what may be done if the defendants succeed in creating their corporation bearing the complainant's name, and a suit shall be brought by the complainant to prevent individuals claiming to be officers or managers of such corporation from interfering with the complainant's business, as already stated.

The temporary injunction heretofore granted is dissolved, and the bill is dismissed.

PENNSYLVANIA COAL CO. v. DOUGLAS and others.

(*District Court, N. D. Illinois.* March 9, 1885.)

This case is in all respects similar to *Lehigh Valley Coal Co. v. Hamblen*, ante, 225, and the bill is dismissed for the reasons already given.

RICHARDSON and others v. DAY and others.

(Circuit Court, N. D. Illinois. February 16, 1885.)

INSOLVENCY — ILLINOIS STATUTE — FRAUDULENT PREFERENCE — ACTION TO SET ASIDE.

No suit can be brought against the assignee of an insolvent, and a creditor to whom he has made a conveyance in fraud of his other creditors, until a demand has been made upon the assignee to sue, and he has refused so to do.

In Equity.

Flower, Remy & Gregory, for complainants.

S. D. Puterbaugh and H. B. Hopkins, for defendants.

GRESHAM, J. The demurrer to the bill in this case was argued last Monday. Day Bros. & Co. were wholesale and retail dry-goods merchants at Peoria, Illinois. On the twenty-eighth of September, 1884, this firm was indebted to the defendant Charles B. Day, late a member of the firm, and a brother of one of the partners of the firm, in the sum of \$200,000, and he was liable on the firm's paper for \$500,000 more. On this date the firm transferred to Charles B. Day its entire stock of goods, worth \$300,000, in discharge of the amount due him, and to secure him against loss on account of his liability upon the firm's paper. Charles B. Day at once took possession of the property transferred to him by bill of sale, which was the entire stock of goods, and the firm at once suspended and ceased to do business. On the ninth day of October following, the insolvent firm made an assignment of their remaining property, under the statute of Illinois, to the defendants Jack and Puterbaugh, for the benefit of the rest of their creditors. The transfer to C. B. Day included the entire assets of the firm, except some bills receivable, the face value of which was \$40,000, but the actual value of which was less than \$20,000. The bill avers that in order to evade the statute of Illinois governing assignments by insolvent debtors, and prohibiting preferences, it was agreed between the firm and Charles B. Day that the former should, by a bill of sale, transfer to the latter their entire stock of goods by way of preference over the other creditors.

The bill also alleges that Jack and Puterbaugh, the assignees, have neglected to take any measures for the recovery of the property transferred to C. B. Day, and that they do not intend to impeach the transaction between him and the assignors. The complainants, who have a claim against the insolvent estate amounting to \$7,700, bring the suit to recover the property transferred to C. B. Day, and have the proceeds thereof equally divided among all the creditors.

If it was true that the insolvent firm had determined to make an assignment under the state law, and that C. B. Day knew of the insolvency and of this disposition, and, for the purpose of evading the provisions of the law and preferring C. B. Day, it was agreed that the transfer should be made to him first in pretended payment of his debt,

and that a formal assignment should be made subsequently, such a palpable evasion of the statute might not be sustained. But that question is not presented for decision. It is clear that no suit can be brought by the creditors against the assignees and Day until a demand has been made upon the assignees to sue, and they have refused to do so. The bill does not allege that before this suit was brought the creditors requested the assignees to sue, and they refused to comply. The assignees are the proper parties to bring all suits to recover property belonging to the estate.

Without expressing an opinion upon any of the other questions presented by the demurrer, it was sustained solely on the ground that the suit was brought by a creditor without a demand being first made upon the assignees to bring the suit.

BROWN v. FISK.¹

(Circuit Court, E. D. Missouri. March 20, 1885.)

1. JURISDICTION—LIABILITY OF STOCKHOLDERS—REV. ST. MO. §§ 736, 745.

A creditor who recovers judgment in a state court against a corporation cannot, under the Missouri Statutes, while the corporation remains undissolved, maintain an action at law in this court against a stockholder in the corporation to recover an amount due from him on unpaid stock.

2. SAME—EQUITY.

In the absence of any statutory proceedings such matters are only cognizable in equity.

Demurrer to Petition.

Fred. T. Ledergerber, for plaintiff.

Geo. D. Reynolds, for defendant.

TREAT, J., (orally.) This is an action brought by a judgment creditor of a railroad corporation against the defendant, as a stockholder, for the amount due from him on unpaid stock. The original judgment was had in the circuit court of Cape Girardeau county. This suit is an independent action brought by the judgment creditor against this stockholder in the St. Louis circuit court,—an ordinary action at law. Matters of this nature are cognizable in equity, and only in equity, unless there is some statutory proceeding with respect thereto. That has been fully determined, notably in a case in 106 U. S. *Patterson v. Lynde*, 106 U. S. 519; S. C. 1 Sup. Ct. Rep. 432.

Now, the Missouri statute has two provisions:

(1) Execution having been returned *nulla bona*, to cite in a stockholder and award what is in the nature of a judgment, that is a new execution against him for the portion of the stock unpaid. But that must be done in the court where the original judgment was rendered. (2) There is another provision

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

that, where the corporation is dissolved, you may proceed by an independent suit.

Now, nothing of the kind has occurred in this case. The party has no standing under the statute at all, nor has he pursued the remedy which the statute prescribes. So far, then, as this court is concerned, a common-law action cannot be tried in this way against a stockholder of an undissolved corporation.

Demurrer sustained, and judgment entered for defendant.

WILSON v. VAUGHN and others.

(Circuit Court, D. Kansas. March 4, 1885.)

EXEMPLARY DAMAGES—WILLFUL REFUSAL OF COUNTY COMMISSIONERS TO LEVY TAX TO PAY JUDGMENT.

In an action against county commissioners to recover damages for a willful refusal on their part to levy a tax on taxable property in a township to pay off a judgment held by plaintiff against such township, in obedience to a peremptory writ of *mandamus* from the United States circuit court, plaintiff will be entitled to recover exemplary or punitive damages, although the actual damage sustained by him was merely nominal.

Motion for New Trial.

Botsford & Williams, for plaintiff.

Ritter & Anderson, for defendants.

FOSTER, J. This action was brought by the plaintiff against the defendants, who are the commissioners of the county of Cherokee, to recover damages for a willful refusal on the part of the said commissioners to levy a tax on the taxable property of Salamanca township, in said county, to pay off a judgment held by plaintiff against said township, in obedience to a peremptory writ of *mandamus* from this court. The recovery of the judgment, the issue and service of the writ commanding the levy of the tax, and the willful disobedience thereof by the defendants, were admitted on the trial, and two of the defendants on the witness stand testified that it was not their purpose to levy the tax hereafter. The plaintiff claimed as his damages the full amount for which the writ was issued,—about \$19,000.

On the trial the court instructed the jury as follows:

"*Gentlemen of the Jury*: In this case, under the pleadings and evidence, the plaintiff is entitled to recover against the defendants, as it was clearly the duty of the defendants to have levied the tax as commanded in the peremptory *mandamus*, and which they willfully refused to do. The plaintiff is entitled to recover his actual damages sustained by reason of such failure and refusal on the part of defendants. But inasmuch as he has not lost his debt or judgment, or any part thereof, and as there is evidence to show that the debtor township is fully able to respond to his debt, and that the refusal of the defendants to levy the tax has only delayed the collection of his debt and the

accruing interest, his damages are consequently presumed to be but nominal, and you will so find in your verdict.

"In this case there is also another element of damages under which the plaintiff may also recover, and that is exemplary or punitive damages. The action of the defendants, to say nothing of being a contemptuous disregard of the mandate of this court, was oppressive of the plaintiff, and a clear and willful violation of his legal rights, and, in my opinion, presents a case for consideration of exemplary damages on the part of the plaintiff against the defendants. I cannot lay down any definite rule to govern you in fixing these damages. They are given by the law as a punishment of an aggravated violation of plaintiff's rights, and they should be such as, under all the circumstances and facts shown, are commensurate with the offense; and this you, gentlemen, in the exercise of your sound judgment, are to fix and determine under the evidence produced in the case.

"The court instructs the jury that this, being an action of tort, in which defendants' refusal was willful, continuous, and unlawful, you are at liberty to award plaintiff exemplary damages against defendants, in addition to the damages awarded, as and by way of compensation to plaintiff. The court instructs the jury that on the issues made by the pleadings, and on the uncontradicted evidence in the case, your verdict must be for plaintiff, finding the issues in his favor."

The jury returned a verdict for plaintiff for \$500, and the defendants now move the court to set aside the verdict and grant a new trial, for error of law in the said instructions to the jury.

The particular matter excepted to is that part of the charge in reference to exemplary or punitive damages. The defendants claim that, as the compensatory or actual damages sustained by the plaintiff were but nominal, he cannot recover exemplary damages. In support of this rule counsel have cited two cases,—*Stacy v. Portland Publishing Co.* 68 Me. 387, and *Maxwell v. Kennedy*, 50 Wis. 647; S. C. 7 N. W. Rep. 657. The former was an action for libel, and the latter for slander. In the action for libel the trial court refused to instruct for plaintiff for exemplary damages *eo nomine*, but told the jury they might add as actual damages for any aggravation of the elements of injury occasioned by the express malice of the person who published the article complained of. The jury gave the plaintiff one dollar damages; and the court refused to reverse the case, and remarked, among other things, as follows:

"Taking the case as it resulted, we are satisfied that the plaintiff has sustained no injury in this respect. The legal signification of the verdict is either that there was no actual and express malice entertained towards plaintiff by the defendant's agent, or that, if there was, it did the plaintiff no injury."

In the slander case the trial court instructed the jury that certain mitigating circumstances shown by defendant should be considered by them in reduction of compensatory damages only, and not exemplary damages. The appellate court held this to be error; that no distinction should have been made between the two classes of damages in respect to mitigation. Both cases support the rule contended for by these defendants in cases of that kind. Whether that doctrine

may be generally regarded as accepted law in such cases, I have not sufficiently examined the books to form an opinion. But, if such is the fact, I do not think the rule can be applicable to a case of this kind.

In *Day v. Woodworth*, 13 How. 371, the supreme court lay down the law as follows:

"It is a well-established principle of the common law that in actions of trespass, and all actions on the case for tort, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff. * * * By the common as well as by statute law men are often punished for aggravated misconduct, or lawless acts, by means of a civil action, and the damages inflicted, by way of penalty or punishment, given to the party injured."

In *Milwaukee R. Co. v. Arms*, 91 U. S. 493, the court, speaking of damages, say:

"In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further unless it was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages."

The supreme court of Kansas has held, in a case of trespass *quare clausum fregit*, that exemplary damages may be recovered where the compensatory damages are but nominal. *Hesley v. Baker*, 19 Kan. 9.

1 Suth. Dam. 724, 748, states the rule in the following language:

"If a wrong is done willfully,—that is, if a tort is committed deliberately, recklessly, or by willful negligence, with a present consciousness of invading another's rights or of exposing him to injury,—an undoubted case is presented for exemplary damages. One who does an act maliciously must be careful to see that the act is lawful, otherwise, though the actual injury may be slight, the exemplary damages may be considerable."

In the case at bar the plaintiff is deprived of a clear legal right through the wrongful and willful conduct of the defendants. They alone have the power to levy the tax, and it is their duty, under the law and the command of the court, to levy it. By no other means can the plaintiff obtain his rights, and it cannot be denied that the action of the defendants is wrongful and oppressive. It was held by the court that the plaintiff's compensatory damages are but nominal, as he has not lost his debt, but has only suffered delay in its collection; but it is in the power of these defendants and their successors in office, by defying the law, to delay him indefinitely in its collection. It is said that defendants can be, and have been, punished for contempt in refusing to obey the writ of *mandamus*. That is true; but that punishment is not to redress the wrong done the plaintiff, but rather to vindicate the authority and dignity of the court. The defendants have been committed to the custody of the marshal

for imprisonment until they comply with the commands of the writ; but in a community where the popular sentiment is all adverse to levying the tax, it is likely the imprisonment of defendants, like the plaintiff's compensatory damages, is but *nominal*. A tax-ridden people are deserving of sympathy, especially when the burden has been fraudulently imposed, though it was done by the dishonesty of their own agent; but neither courts nor communities can afford to deny to any orator the exact letter of his legal rights; and it is not a pleasant or consistent thing to inveigle against nullification of the laws, and cry out "law and order," and in the same breath applaud nullification, lawlessness, and disorder.

The motion to set aside the verdict and for a new trial must be overruled.

OREGONIAN RY. Co., Limited, v. OREGON RY. & NAV. Co.

(Circuit Court, D. Oregon. March 18, 1885.)

1. CORPORATION—ESTOPPEL TO DENY CORPORATE EXISTENCE OR POWER.

A person contracting with an ostensible corporation to do an act not prohibited by law, is estopped, in an action by said corporation on said contract, to deny the existence of the corporation, or its power to enter into such contract.

2. SAME—IN ABATEMENT OR BAR.

The want of corporate existence may be pleaded in abatement or bar: but the want of capacity to sue in a particular case must be pleaded in abatement.

3. SAME—FOREIGN RAILWAY CORPORATIONS.

By the act of October 21, 1878, (Sess. Laws, 9th), foreign railway corporations, for the purpose of constructing and operating railways in this state, are placed on the footing of domestic corporations.

4. SAME—THE OREGONIAN RAILWAY COMPANY.

By the act of October 22, 1880, (Sess. Laws, 56,) this body was recognized as an existing corporation, lawfully engaged in the construction and operation of a railway in this state, from Portland to the head of the Willamette valley, with the power to dispose of the same by lease or otherwise.

5. SAME—ULTRA VIRES.

In an action against a corporation on a contract made by it, the corporation is not estopped to show that such contract was beyond its power to make.

6. SAME—OREGON CORPORATIONS, POWER OF.

The Oregon corporation act of October 11, 1862, (Laws Or. 524,) authorizes three or more persons to form a corporation to engage "in any lawful enterprise, business, pursuit, or occupation;" and this includes the power to buy and sell or lease a railway.

7. SAME—ESTOPPEL—EXECUTED CONTRACT.

The contract of a corporation, though invalid for want of power in the corporation to make it, may, if not illegal, be enforced against such corporation, where it has had the benefit of the consideration therefor; but a covenant to pay the rent reserved on a lease six months in advance, is not such a case. The consideration for such a promise is the future use and occupation of the property, and not the past one.

8. SAME—POWER OF DIRECTORS AND SHAREHOLDERS.

The corporate powers of a corporation, formed under the law of this state, are vested in the directors; and the validity of their acts is not affected by the assent or dissent of the shareholders; and the powers of the latter are limited to the matters which concern the internal organization of the corporation.

9. SAME—SUBSCRIPTION TO CAPITAL STOCK.

A subscription to the capital stock of a corporation is thereby pledged to the use or maintenance of the purposes of its organization, as specified in its articles, and may be applied to such of them as the directors shall determine.

Action on Covenant in Lease to Recover Rent.

John W. Whalley and William B. Gilbert, for plaintiff.

Cyrus Dolph and Charles B. Bellinger, for defendant.

James C. Carter also submitted a *written* brief for defendant.

DEADY, J. This action is brought by the plaintiff, a corporation alleged to have been formed in Great Britain under the "Companies Act of 1862," against the defendant, a corporation formed under the Oregon corporation act of 1862, to recover the sum of \$68,131, alleged to be due the plaintiff on a lease of its railway, in Oregon, commonly called the "Narrow Gauge" road, for the half year commencing May 15, 1884. The case was before this court in December last, on a motion to strike out the second amended answer of the defendant as "frivolous and immaterial," and for judgment on the complaint, which was denied, for the reasons then given. 22 FED. REP. 245. At the same time the defendant had leave to file a third amended answer, containing two additional defenses.

It appears from the amended complaint, filed on August 15, 1884, that the plaintiff became a corporation on April 30, 1880, by certain persons making and delivering for registry, under the companies act aforesaid, a "Memorandum of Association" and "Articles of Association," as therein alleged and set forth, with a registered office at Dundee, in Scotland, and power, among other things, to own, purchase, construct, operate, lease, and sell any railway in Oregon; that the defendant became a corporation under the Oregon act aforesaid on June 13, 1879, by certain persons making and filing articles of incorporation as therein alleged and set forth, with its principal place of business at Portland, in Oregon, and power, among other things, "to purchase or consolidate with, or lease or operate and maintain, on such terms as may be agreed upon," any railway in Oregon; that on August 1, 1881, the plaintiff was the owner of a certain railway in Oregon, and then demised the same to the defendant, by an instrument in writing, for the term of 96 years, for and upon a yearly rent of 28,000 pounds sterling, which rent the defendant thereby expressly agreed to pay the plaintiff in half-yearly installments in advance, and that the defendant, by its proper officers, duly executed said instrument,—they being first thereunto duly authorized by a vote of the directors; and that the defendant thereupon entered into the possession of said railway and operated the same, but has failed and refused to pay the installment of rent falling due on May 15, 1884.

It is also stated in the complaint that on said last-mentioned date the defendant, pretending that neither party to said lease was authorized to execute the same, offered to restore the demised property to the plaintiff, but not in as good a condition as when received by the

defendant, which offer the plaintiff refused to accept; and thereupon, to prevent the loss and injury that might result from suddenly discontinuing the operation of the road, it was agreed between the plaintiff and defendant that the latter should retain the possession thereof, and continue to operate the same, for a period of six months thereafter, during which time this action was commenced, to-wit, on June 28th; but neither such agreement, nor the action of either party thereunder, was to in any way prejudice its claim or contention as to the validity of said lease, or affect its rights in the premises. By the amended answer now filed, as well as in the former one, the defendant admits that it is a corporation, formed under the laws of Oregon, and that its president and assistant secretary signed the writing aforesaid, and affixed thereto the corporate seal, in pursuance of a resolution of its directors, as alleged in the complaint; that in pursuance of said writing it entered into the possession of said railway, and operated the same and paid the rent therefor, as therein provided, until May 15, 1884, when it offered to return the same to the plaintiff, which offer was declined, and that it has since retained the possession thereof only under a special agreement with the plaintiff, as above stated; that the said companies act of 1862 is correctly set forth in the amended complaint, and that it comprises all the law of Great Britain touching the power and authority of corporations created or existing under the laws thereof; and denies—

(1) That the defendant is or ever was a corporation formed or existing under the companies act of 1862, or otherwise, or at all; (2) that neither said companies act, nor any other law of Great Britain, confers on the plaintiff the power to lease said railway; (3) knowledge or information sufficient to form a belief, (a) as to whether a memorandum or articles of association were made and delivered for registry in pursuance of said companies act or at all, (b) or as to whether the plaintiff has a registered office at Dundee, in Scotland; (4) that the plaintiff is or ever was authorized to own, purchase, construct, operate, lease, or sell any railway in Oregon; (5) that either the plaintiff or defendant ever had the power or authority to execute said instrument in writing or any indenture for the leasing of said railway, or that the stockholders of the defendant ever authorized or assented thereto, and that said "pretended lease was and is unauthorized and void," and that any sum of money is due the plaintiff from the defendant; and avers "that it has fully paid the rental provided for in said pretended lease" for the period during which it held possession of said railway thereunder, to-wit, for the term ending May 14, 1884.

The further defenses contained in the answer are briefly these:

(1) The railways which "the defendant was and is organized to construct and operate, and the *termini* of which were specified in its articles of association," are east of Portland, and do not embrace the railway alleged to have been demised to the defendant, nor any one to the south of said city, and that said railway forms no part of and has no "near connection" with the said roads of the defendant. (2) That prior to the execution of said pretended lease "the capital of the defendant had been contributed and applied in the construction and equipment" of railways, the *termini* of which are specified in its articles of association, and which have "no near connection" with the one mentioned in said lease; and that said lease was never authorized or as-

sented to by the stockholders of the defendant, and was a wholly unauthorized attempt by the officers thereof "to divert and subject the capital of defendant to a wholly new object and enterprise not contemplated when said capital was contributed and expended."

The plaintiff demurs to this answer:

(1) To so much thereof as denies the corporate existence or due organization of the plaintiff, or its power to make the contract herein sued on, for that the defendant ought not to be allowed or heard to say or allege the same contrary to its deed of August 1, 1881, as aforesaid; (2) to so much thereof as denies the power and authority of the defendant to make said contract, for that the same does not constitute a defense; and (3) to the first and second special defenses therein, for that "the new matter therein set up" does not constitute a defense.

The plaintiff also moves to strike out certain portions of the answer, as follows:

(1) The admission that the defendant is and was a corporation under the laws of Oregon, coupled with the denial that it ever had the power to purchase or lease a railway in Oregon, because the admission is redundant, and the denial sham and frivolous; (2) the admission that the defendant entered into possession of the railway under the alleged lease, coupled with the denial that the possession has been held thereunder since May 15, 1884; (3) the denial that at the time the defendant offered to restore the road to the plaintiff, it was not in as good condition as when received by the defendant, because the same are frivolous and irrelevant; and (4) "the rest and residue" thereof, not hereinbefore asked to be stricken out or included in the demurrer thereto, because the same is irrelevant.

The demurrer and motion were argued by counsel and submitted together.

This is substantially an action on the covenant of the defendant, contained in the lease, to pay the rent therein reserved, and its liability thereon does not depend on its use or occupation of the property. *Mills v. Auriol*, 1 Smith, Lead. Cas. 910. Therefore the allegations in the pleadings concerning the special agreement under which the defendant has operated the road since May 15, 1884, are immaterial and not relevant to the controversy involved in the action. And the same may be said of the allegations concerning the plaintiff's compliance with the laws of this state concerning foreign corporations doing business herein, as there are no laws on the subject applicable to the plaintiff. *Oregon & W. T. & I. Co. v. Rathbun*, 5 Sawy. 32.

When the case was before the court on the motion to strike out the answer, counsel for the plaintiff made the point that the denial of the plaintiff's corporate existence was a plea in abatement, and therefore waived by being pleaded with matter to the merits. But the court, admitting the rule, held that the matter was pleaded in bar, as it might be, and refused to strike it out. 22 FED. REP. 248. In the brief now filed in the case, counsel returns to the argument, and insists that this denial of the corporate existence is a plea in abatement; citing *Conrad v. Atlantic Ins. Co.* 1 Pet. 450, where it is said

that a plea to the merits admits the capacity of the plaintiff to sue, and that a want of corporate capacity should be taken advantage of by a plea in abatement. But the capacity of the plaintiff to sue is not all that is involved in a denial of its corporate existence.

In *Society, etc., v. Pawlet*, 4 Pet. 501, the court, in considering the question whether the plaintiffs had a right to hold land, and therefore to maintain an action for the possession thereof, says:

"No plea in abatement has been filed, denying the capacity of the plaintiff to sue, and no special plea in abatement or bar that there is no such corporation as stated in the writ. * * * If the defendant meant to have insisted on the want of corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar."

A corporation may exist for many purposes and yet not have capacity to sue in a particular case, and a plea in abatement is the proper mode of taking advantage of that fact; but the defense of a want of corporate existence goes further, and may be pleaded either in abatement or bar. But the latter is the most effective, and unless the matter is specially pleaded, as in abatement, it will be considered in bar or to the merits.

The demurrer to the answer raises three questions:

(1) Is the defendant estopped to deny the corporate existence and due organization of the plaintiff, or its power to enter into the contract sued on? (2) was the defendant authorized to enter into this contract? and (3) is the new matter contained in the two special defenses, or either of them, a bar to the action?

For the plaintiff it is contended that the first two of these questions must be answered in the affirmative, and the last one in the negative. The argument is that the defendant, having contracted with the plaintiff, as a corporation existing under the laws of Great Britain, by the corporate name of "The Oregonian Railway Company, Limited," for the lease of its railway, is now estopped to deny such corporate existence, or the power to make the contract in question.

When this case was under consideration before, it was said by the court, (22 FEB. REP. 249:)

"The law is well settled that a person who contracts with an *apparent* corporation, as such, is estopped, when sued on such contract, to say that the plaintiff had no corporate existence or power to make such contract. A corporation, like an individual, when sued on a contract, may set up as a defense to the action its want of power or capacity to make such contract; but the party with whom it contracts cannot set up such want of power or capacity as a defense to an action by the corporation for a breach thereof. And the reason of the distinction is that legal disability, as in the case of a minor, is a defense personal to the party who is under it, and cannot be taken advantage of by another." Citing *Cowell v. Springs Co.* 100 U.S. 61; Bigelow, Estop. (3d Ed.) 464, 465.

But counsel for the defendant now question the soundness of the rule laid down in Bigelow, *supra*, that legal disability can only be availed of by the party who labors under it, and cites *Bank of Mich-*

igan v. Niles, Walk. Ch. (Mich.) 99; *Ogdensburg, etc., Co. v. Vermont, etc., Co.* 6 Thomp. & C. (N. Y.) 488; and *Middlesex R. Co. v. Boston, etc., Co.* 115 Mass. 347, to the contrary. The first case is not produced, but only a citation from it, in *Mor. Corp.*, where it is cited (section 87) in support of the proposition, "A corporation cannot be compelled by legal process to do an act unauthorized by its charter," which is a very different thing from the purpose for which it is cited here. The case appears to have been a suit for specific performance of a contract for the sale of real property, which was probably not merely void as being *ultra vires* the plaintiff corporation, but actually illegal, because prohibited by its charter.

The second is not in point, for the plaintiff corporation brought the suit to determine the validity of its lease to the defendant, and invoked the judgment of the court thereon. The demurrer to the complaint was sustained at the special term of the supreme court; and the decision of the court at the general term, which is cited, is only to the effect that the plaintiff had not ratified the lease by accepting rent thereon pending the appeal from the order sustaining the demurrer to its complaint; and for the very good reason that if the lease was *ultra vires* because the corporation had no power to make it, it could not be ratified. And the last case is wider still of the mark. A horse railway was leased by a corporation, and an action was brought by the assignee of the lessee against the lessor for money for repairs; claiming that, by the terms of the lease, the latter was bound for one-half of such expense. The defendant corporation set up the invalidity of the lease, because of its want of power to make it, and the court sustained the objection, and gave judgment accordingly.

Two cases decided in this court (*In re Comstock*, 3 Sawy. 218, and *Semple v. Bank*, 5 Sawy. 88) are also cited to show that the legal disability of a corporation to make a contract may be set up as a defense in bar of an action thereon by such corporation. But the act or contract of the foreign corporation, the validity of which was contested in these cases, was not only unauthorized in this state, but was absolutely prohibited therein, and therefore illegal; and this, without any reference to the power or capacity of the corporation in the country of its formation and domicile. The same may be said of the cases *Rochester Ins. Co. v. Martin*, 13 Minn. 59, (Gil. 54;) *Farmers', etc., Bank v. Baldwin*, 23 Minn. 198; and *Bank v. Pierson*, 24 Minn. 140, cited by counsel for the defendant for the same purpose.

When it appears that the existence of a corporation, or the exercise of a particular power by it, is prohibited by statute or the common law, in my judgment any one who has entered into a contract with such corporation may plead the fact of the prohibition to exist or make the contract in question as a defense to an action thereon. In such case the contract is not only unauthorized, but is illegal and contrary to public policy. As was said by this court in *Re Comstock*, 3 Sawy. 218:

"No one is estopped to show that an act upon which a party claims a right is illegal simply because he was a party to it, even *in pari delicto*. If the matter concerned the parties to the transaction alone, the rule might be otherwise. But the interest of society, in whose behalf the act is prohibited, is paramount to private equities."

But where the law authorizes the formation and existence of the alleged corporation, with power to make the contract in question, then a party thereto ought not and cannot be heard, in an action thereon by such corporation, to deny its due formation or legal existence, with the power to make said contract.

Now, in this case, it appears by section 6 of the law of Great Britain, called the "Companies Act of 1862," that "any seven or more persons, associated for any lawful purpose, may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the act in respect of registration, form an incorporated company, with or without limited liability." Under this law the plaintiff might have been incorporated for "any lawful purpose." Nothing appearing to the contrary, a purpose to construct, purchase, own, operate, or lease a railway is as lawful as a purpose to engage in the manufacture or sale of any of the common necessities of life. And it was and is at liberty, under the comity of nations, and until the legislature shall prohibit it, to pursue such purpose or exercise such powers in Oregon. True, it could not acquire the right of way over another's property by appropriation or condemnation, as a domestic corporation may do, unless specially authorized by the legislature. But it might do so with the consent of the owner, and the result would be the same. There is no mystery or monopoly in the railway business in Oregon. Any natural person, or corporation formed for that purpose, may, if he or it has or can obtain the right of way, construct and operate a railway between any points in this state and dispose of the same as freely and absolutely as if it were a steam-boat or mill.

It follows that the defendant, having taken a lease of this railway from the plaintiff, by its corporate name of "The Oregonian Railway Company, Limited," is estopped, in this action on its covenant in such lease to pay the rent reserved therein, to deny the corporate existence or due organization of the plaintiff, or its power to make such lease. After not a little confusion and uncertainty on the subject, this, in my judgment, is the final conclusion reached by the courts and text writers; and the justice and expediency of the rule has secured it a place in the draught of that well known and considered work, "The Civil Code of the State of New York," in these apt and plain words:

"Sec. 382. One who assumes an obligation to an *ostensible* corporation, as such, cannot resist the obligation on the ground that there was in fact no such corporation, until that fact has been adjudged in a direct proceeding for that purpose."

But by the act of October 21, 1878, (Sess. Laws, 95,) this corporation was placed on the footing of a domestic corporation in Oregon. That act provides "that any foreign corporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating, any railway, * * * shall, on compliance with the laws of this state for the regulation of foreign corporations transacting business therein, have the same rights, powers, and privileges" as a domestic corporation formed for such purpose, and no more. The effect of this act is to make the plaintiff in some respects an Oregon corporation. Its existence, power, and capacity are still derived from and may be measured by the law of Great Britain, and the terms of its organization thereunder. But in the exercise of this capacity and power as owner, builder, or operator of a railway in this state, it comes under and is subject to the regulations and limitations of the Oregon corporation act, in the case of domestic corporations of like character and purpose. It may be admitted, then, that if by the law of this state a domestic railway corporation is prohibited from leasing its road, a foreign corporation owning a railway herein would be under the same disability.

However, by the act of October 22, 1880, (Sess. Laws, 56,) entitled "An act to grant the Oregonian Railway Company, Limited, the right of way and station grounds over the state lands, and terminal facilities upon the public grounds at the city of Portland," the plaintiff was directly recognized as an existing corporation lawfully engaged in the construction and operation of a railway in Oregon, from "Portland to the head of the Wallamet valley," and as such there was granted to it "and to its assigns, the owners and operators" of said railway, certain valuable "rights, privileges, easements, and property," as suggested in the title thereof. The effect of this act is clearly to establish, so far as this state and this court is concerned, the legal right of the plaintiff to construct, own, and operate this road, and in my judgment to dispose of it, either absolutely or for a term of years. *Society, etc., v. Pawlet*, 4 Pet. 501. The grant therein contained is made to the plaintiff and its "assigns;" while a proviso in section 1 declares—

"That the said Oregonian Railway Company, Limited, or its assigns, shall have no power to sell, convey, or assign the premises or rights hereby granted, or any part or parcel thereof, to any person, persons, firm, or corporation, save only with and as a part and parcel of and as appurtenant to the railway now built and owned by said company, and now in process of construction by it."

Plainly this implies that the plaintiff had the power to assign its road,—dispose of it,—and might also assign or dispose of "the premises and rights" then granted to it, in connection therewith, but not otherwise.

Had the defendant the power to make this contract? is the next question raised on this demurrer, though it should properly have been

made by a demurrer to the complaint. The denial in the answer, of the power of the defendant in this respect, does not controvert any fact in the complaint, and is nothing but a conclusion of law or a denial of one. But the question, however raised, is to be tried by the constitution and laws of the state, and the defendant's articles of incorporation thereunder. The constitution (art. 11, § 2) provides:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested or corporate rights."

On October 11, 1862, the legislature passed the first act in pursuance of this provision of the constitution, (Laws Or. 524,) which, with some comparatively unimportant amendments, has continued in force ever since. So far as I know, it is the next one in point of time to the British companies act of August of the same year, in which the subject of the formation and purpose of corporations is substantially divested of all exclusiveness and restraint, and put on the practical plane that a corporation is essentially nothing but a partnership, endowed with the capacity of acting as a single person under a particular name, and therefore that any and all persons should be allowed to incorporate themselves for the prosecution or transaction of any enterprise, business, pursuit, or occupation, not prohibited to individuals or partnerships. Accordingly, this act provides (section 1) that any three or more persons may incorporate themselves "for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation," in the manner provided therein. All that is required is to make and file articles of incorporation specifying, (1) the name and duration of the corporation; (2) the enterprise, business, pursuit, or occupation in which it proposes to engage; (3) the place of its principal office; (4) the amount of its stock and the value of each share thereof; and, (5) if it is formed for the purpose of navigating any water, or building a bridge, canal, or road, the *termini* of such navigation, canal, or road, or the site of said bridge.

Subject to the provisions and limitations of the act, these articles of association are the charter of the corporation, and in the prosecution of its undertaking, and the management and disposition of its property, it is not subject to any other restraint than that which the law may impose in the case of natural persons in like circumstances. Whatever is not generally forbidden by the law of the land may be undertaken by a corporation thus formed for the purpose. Exclusive privileges are not allowed to any one; and the only policy indicated by the act is to promote the transaction of all kinds of business by means of corporations to be formed and dissolved at the pleasure of those particularly interested. Any number of corporations may be formed for the same purpose and at the same place; for instance, to keep a school, a store, a tavern, or to build and operate a steam-boat or railway between the same points. Nor is a corporation formed

under this act under any obligation to the public to maintain its existence, or carry on its corporate enterprise or business, any longer than the shareholders or a majority of them may think desirable. Whenever a majority of these, for any reason, vote to disincorporate, the life of the corporation is at an end, except that it may continue to exist, for the period of five years thereafter, for the purpose of winding up its affairs, including a final disposition of its corporate property, be the same a railway or a fish-wheel. Laws Or. p. 528, § 19; Sess. Laws, 1878, p. 91, § 2. In short, as was lately said by a distinguished jurist, in a brief for this defendant, in a case pending in the United States circuit court for the southern district of New York: "The Oregon system may be succinctly defined as free trade in corporations and free corporations."

In the consideration of the question as to the validity of a lease of corporate property made by a corporation formed under this system, the case of *Thomas v. Railroad Co.* 101 U. S. 71, so much relied on by the defendant, is in some respects altogether inapplicable. That was a case of a corporation created by a special act of the legislature of New Jersey, to build and operate a certain railway. The court held that the power to lease the road, not being specially given by the act of incorporation, nor fairly implied from anything contained therein, the contract of the corporation to that effect was *ultra vires* and void. In delivering the opinion of the court Mr. Justice MILLER says:

"Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

This rule is of universal application, and applies to a corporation formed under the law of Oregon as well as New Jersey. The articles of association, together with the corporation act under which they are made, constitute the charter of an Oregon corporation, and any act done by such corporation, not expressly or by fair implication authorized thereby, is *ultra vires* and void. It was also said, in the course of the opinion, that the contract of the New Jersey corporation was one "forbidden by public policy," and therefore beyond its power to make.

Whatever a corporation is "forbidden" to do, either directly by statute, or by a public policy fairly indicated by or deducible from the legislation of a state or country or the decisions of its courts, or both, is, of course, beyond its power to do. In such case the act is not only beyond the power of the corporation, and therefore invalid, but it is prohibited, and therefore illegal, and incapable of ratification, and any one dealing with the corporation is not estopped to allege and show such illegality. But the public policy on the subject of leasing railways in a state where corporations are not permitted for the purpose of constructing or operating them, except when created by a special act of the legislature for the construction or operation of a road be-

tween certain points, may be and manifestly is very different from that of a state like Oregon, where any number of corporations may be formed by the voluntary association of individuals, to build and operate railways when and where they think best, with power to disincorporate and dispose of their property at their own pleasure. And so, on this point, I do not regard the case of *Thomas v. Railroad Co.* applicable here.

The right of the defendant to make the defense of *ultra vires* as against the plaintiff, notwithstanding the express provision in its articles authorizing it to lease and operate any railway in Oregon, is already conceded in this opinion, upon the authority of Bigelow, *Estop.* (3d Ed.) 466. But the authorities are not uniform on the subject. And see *Field, Corp.* § 386. Here, it is admitted that the defendant held itself out to the world as a corporation organized to lease and operate any railway in Oregon. Such was the specification in its articles of the power and purpose, among others, of its organization. By this defense of *ultra vires* the defendant does not question the legality of an act done by its directors without apparent authority, or upon a doubtful or questionable construction of its articles, but it seeks to repudiate an act done by them within the plain letter and purpose of a particular power deliberately asserted and assumed by its incorporators in the execution of its articles, and to which every one of its shareholders, it must be presumed, thereafter gave his unqualified assent. It must be admitted that a sense of justice cannot be invoked in favor of such a defense. It must therefore stand or fall on the decision of the naked legal question, whether the defendant was authorized in its formation to assume as it did the power to lease this or any other railway in Oregon.

The decision of this question involves the inquiry whether the taking a lease of a railway and a covenant to pay the rent reserved therein was an unlawful act in this state at the formation of the defendant corporation and at the date of this lease. Whatever "enterprise, business, pursuit, or occupation" was then lawful, the defendant might undertake in its articles to accomplish or engage in. There never was any legislative or judicial action in this state, except in one particular, to be hereafter noticed, indicating that such a transaction is unlawful or contrary to public policy. To take a lease of a railway and operate it, is in itself as lawful and meritorious an act as to construct one. No one would question the right of a natural person to do such an act. And whatever any one may do as an individual, any three or more persons may do as a corporation, unless restrained by some provision of law applicable to corporations only.

The corporation act of this state, as originally passed, contained a clause, (section 20,) inserted on its passage through the senate at the instance of interested parties, declaring that no corporation formed or created under it or other statute of the state for the purpose of navigating any water of this state, should ever "purchase, lease, or

in any way control" any road built by any other corporation formed under such act. This prohibition, it was well understood, was aimed at the Oregon Steam Navigation Company, a corporation then existing under a special act of the territorial legislature, and soon afterwards incorporated under the corporation act, in pursuance of section 18 thereof, and the predecessor of the defendant herein, and intended to prevent it from controlling any road that might be built on the bank of the Columbia, between Portland and the Dalles, and particularly around the Cascades of the Columbia, for the purpose of preventing competition with its steam-boats. This is the only restraint on the power of corporations in this respect that ever crept into the legislation of Oregon; and the rational and legal inference from the premises is that all leases of roads taken by a corporation formed under the act, except the kind thereby specially prohibited, are permitted.

But this is not all. By the act of October 18, 1878, (Sess. Laws, 59,) said section 20 was repealed and re-enacted, so as to omit the restraining clause, and since then there has been no indication of any purpose on the part of the state to restrain or limit the power of corporations in this respect. The idea of such restraint is also incompatible with the provision of the corporation act (section 17) that, in effect, authorizes a railway corporation to terminate its existence at its option, and dispose of its road. No natural persons, unless incorporated, are likely to purchase such property, and if there was any implied prohibition against the one corporation from becoming a purchaser, the right given to the other to sell would be so far rendered nugatory. The power to dispose of a road must include the power to lease; and the power to buy, the power to take a lease. So, by the act of October 22, 1880, *supra*, the right of the plaintiff herein to assign its road—to dispose of the same by sale or lease—is recognized; but if a corporation could not be formed or exist under the law of Oregon with power to buy the same or take a lease thereof, the *jus disponendi* of the former would be comparatively worthless.

Counsel for the plaintiff also makes the further point that this is an executed contract, and therefore the defendant is estopped to allege its invalidity in this action. It is well established that a contract, not tainted with illegality, but merely invalid for want of power in the corporation making it, may be enforced against such corporation when it has received or had the benefit of the consideration therefor. Bigelow, Estop. (3d Ed.) 574, 575; Field, Corp. § 263. But this contract does not come within that category. The defendant corporation could not set up the invalidity of this contract as a defense to an action for the rent of the property during a period that it had the use and benefit of the same. But this action is brought on a contract to pay rent in advance, and not for past use and occupation. The consideration for the covenant or promise to pay this installment of rent is not the past but the future use of the property. The contract to pay is therefore executory; and the same may

be said of every other installment of rent provided for in the contract. The liability to pay it arises out of the covenant to do so, and the consideration for this is the future use and occupation of the property for a corresponding period. The case of *Thomas v. Railroad Co.*, *supra*, 86, is exactly in point on this question.

The effect of the two special defenses will now be considered. They deserve but little attention, for they are both utterly bad. It makes no sort of difference whether the railway leased from the plaintiff had any "near connection" with the roads whose *termini* are specified in the defendant's articles or not. Those roads it took the power to construct and own; but it also took the power to lease any other railway in Oregon, whether "so near or yet so far" from such roads. As between the plaintiff and the defendant, the directors of the latter were the sole judges of the propriety or expediency of taking this lease, and the assent or the dissent of the shareholders was altogether immaterial. They were powerless in the premises, and could neither prevent, authorize, nor ratify it. This does not, of course, question the right of the shareholders to invoke the aid of a court to *prevent* the directors from making a contract which, though legal, may be improvident or considered an abuse of their trust.

But the power of a corporation formed under the corporation act of this state, as to its relations with third persons, is vested in and exercised by the directors. The power of the shareholders is limited to a few matters concerning its internal affairs, namely, the election of directors, the increasing of the capital stock, the adding to the powers and purposes of the corporation, and the authorizing its dissolution. Nor is it true in any legal sense, even if material, that "the capital of the defendant" was contributed for the construction and equipment of the roads it was formed to build and own, rather than the leasing of the plaintiff's road. Nothing is clearer than that every dollar subscribed to the capital stock of the defendant was thereby pledged for any and all of the purposes specified in its articles, and may be applied and used, at least so far as third persons are concerned, to such of them as the directors shall determine.

In conclusion, the directors of the defendant corporation, in pursuance of the express power given them by the corporation act and the articles of incorporation, determined to take a lease of the plaintiff's road, yielding and paying a certain rent therefor, and to that end duly directed and authorized their president and secretary to sign said lease and affix the corporate seal thereto, which was done. By this means the defendant became legally bound to pay the plaintiff the rent reserved, and in default thereof the latter may maintain this action to recover the installment now due; and therefore the demurrer is overruled, and the motion to strike out is allowed, and judgment is given for the plaintiff for the sum sued for,—\$68,131,—together with legal interest thereon from May 15, 1884, and the costs and disbursements of the action.

MERRILL v. INSURANCE CO. OF NORTH AMERICA.¹

(Circuit Court, D. Minnesota. March, 1885.)

1. FIRE INSURANCE—INCREASE OF HAZARD—TENANT MAKING ALTERATIONS.

Where a fire insurance policy provides that any change increasing the hazard, either within the premises or adjacent thereto, within the control of or known to the assured, and not reported to the company and agreed to by indorsement thereon, will render the policy null and void, to defeat a recovery in action for loss, the company must affirmatively prove that changes made by a tenant, which increased the hazard, were made by the consent of the owner or his agent.

2. SAME—PROOFS OF LOSS—FALSE STATEMENTS.

A false statement in the proofs of loss, to defeat a recovery, must be false to the knowledge of the assured, and made for the purpose of defrauding the company.

At Law.

Secombe & Sutherland, for plaintiff.

W. D. Cornish, for defendant.

NELSON, J. This suit is brought to recover on a fire insurance policy. A jury is waived. Plaintiff introduced in evidence the policy, offered proof of the fire and value of the property, and introduced proofs of loss, and is entitled to a judgment unless the defendant sustains one or more of the defenses urged, which are, (1) that there was a change of risk, which rendered the policy void; (2) fraud in proofs of loss. The policy contained these conditions and stipulations:

"Any change increasing the hazard, either within the premises or adjacent thereto, within the control of or known to the assured and not reported to this company, and agreed to by indorsement thereon, will render this policy null and void. An attempt to defraud the company in the matter of a claim for loss, by false swearing or otherwise, shall cause a forfeiture of this policy, and all claim for loss thereunder."

The stipulation in reference to change of risk must be kept in good faith by the assured, and information of any change in the hazard, and thereby increasing the rate of premium, must be agreed to by the insurer. However, any change increasing the hazard, and rendering the policy void, must be by the act, authority, consent, or cognizance of the assured, or by the consent of her agent.

The building insured was built of stone, with frame office in the rear, and located in the city of Minneapolis, and described in the policy as a store-house. It was insured for one year from June 19, 1883, and burned February 13, 1884.

The principal testimony relied upon by defendant to defeat a recovery is that of Stevens, the tenant, and Trumbell, the defendant's agent; and it is also urged that the evidence of Merrill, the agent of the assured, indicates that he was aware of the improvements which were made. The changes and alterations in the building, and adja-

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

cent thereto, undoubtedly increased the risk, and would render the policy void if known to the agent, Merrill; for no information of them was furnished the company, and its assent thereto was not obtained. It is in proof that they were commenced during the last of December, 1883, by Stevens, the tenant. He had temporarily leased the building in the fall of 1882, and on June 19, 1883, had made a definite arrangement for continuing his lease for a year, at which time the insurance policy was written. The property was owned by the plaintiff, who lived in Boston, Massachusetts, and was in charge of the agent, D. B. Merrill, who lived in St. Paul, Minnesota.

The agent visited the tenant, Stevens, in December, 1883, or January, 1884, and had a conversation with him, and the effect of it was, as Stevens testifies, that he was about to make changes, and wanted Merrill, before he went south, to come down and see him. Stevens wished to get a lease of the building or an understanding about it, and that was the reason given why he wished Merrill to come down before he went south. He is not certain that it was in a conversation or on a postal card sent to St. Paul that this request was made; but he does testify that Merrill came to Minneapolis, and a conversation took place in front of the building, in which Stevens stated that he was making changes which he considered improvements, and wanted Merrill to lease him the building for another year at \$30 per month,—the same rent as the previous year,—in consideration of his fixing it up and putting the improvements on it. The improvements talked about “were putting on a shed at the rear,—a roofed shed,—and putting on a new front, and fixing up the windows, and making general improvements.” The changes thus indicated would not necessarily increase the risk, and Stevens is careful to say in his testimony that he don’t recollect whether he spoke definitely about occupying it for any other purpose than he had previously, which was for storage. He never saw Merrill again until after the fire. Some correspondence between the parties is introduced in evidence, but there is nothing in it indicating that Merrill knew of or consented to the changes which were made. He went south soon after.

The conversation in December or January was brief. They were together only about 10 or 15 minutes, and did not go into the building; and at that time the office had been moved up from the rear of the stone building to the front, but it does not appear that such change increased the risk, and upon the shed in the rear only the roof had been put on. It does not appear that this was visible to Merrill, or that he knew that it was being built, and Stevens said nothing about it. Merrill denies knowledge of the changes made, except the moving of the office and putting in the window, and that is about all Stevens’ testimony shows he had knowledge of. Trumbell, the company’s agent, fails to show that Merrill knew about the change made by the tenant. It is claimed that Merrill, after the fire, in conversation with Trumbell, admitted that he knew that Stevens was going to

make changes, and only refused to allow a reduction of rent in consideration of any alterations made; but he does not admit he knew the character of the changes, and Trumbell is particularly careful to testify that Merrill, the agent, never said that Stevens informed him that he was going to make the changes which he finally did. Stevens had indicated to Merrill what changes he would like to make, which would not necessarily increase the hazard, and are not shown to be of that character. He specified the kind of alterations he was about to make, and, though he spoke of general improvements, it was in connection with the others mentioned. The owner of the building is not liable for the acts of the tenant which would forfeit this policy, unless he has assented thereto.

The tenant could make general changes and repairs, or improvements which did not enhance the risk; and in order to defeat a recovery the defendant must affirmatively prove that these changes, which the evidence shows did increase the hazard, were made by the consent of the owner, or his agent, Merrill. I think the testimony fails to prove this; for if it is conceded that he knew that general improvements were to be made, the rule invoked by counsel, that a general assent to make improvements implies authority to make such as would increase the hazard, does not apply. The defendant, to sustain this defense, must show that Merrill knew the character of the improvements; for it is only "changes increasing the hazard" that must be reported and agreed to.

2. Did the plaintiff make out and swear fraudulent proof of loss? It is urged that in the proofs of loss, the assured should have stated that the tenant had made alterations, increasing the hazard, without her knowledge, and given the situation and position of the property at the time of the loss, and in not doing so she committed a fraud which defeats a recovery. There is no evidence that the assured knew anything about the alterations. She lives in Boston, Massachusetts, and managed the property through an agent. And although she made the proofs of loss, the company do not object on that account. Unless the assured had personal knowledge of the change of risk, and made the proofs of loss for the purpose of defrauding the company, knowing their falsity, there is no fraud. The proofs must comply with the contract obligations of the assured, and fairly state the situation of the property at the time of the loss, within her knowledge; and in so stating, the policy does not require that facts communicated by some one else, about the situation of the property at the time of loss not within her knowledge, should be set forth. A false statement, to defeat a recovery, must be false to the knowledge of the assured, and made for the purpose of defrauding the company. This defense is not sustained by the evidence.

The plaintiff is entitled to judgment for the sum of \$1,578.75; and it is so ordered.

RUSSELL and others v. WORTHINGTON, Collector.

*(Circuit Court, D. Massachusetts. March 13, 1885.)***CUSTOMS DUTIES—TIN CANS CONTAINING LOBSTERS—ACT OF FEBRUARY 8, 1875.**

Tin cans containing lobsters imported from Prince Edward's island and from Halifax, Nova Scotia, are subject to duty under the act of congress of February 8, 1875.

At Law.

L. S. Dabney, for plaintiff.

Geo. P. Sanger, U. S. Atty., for defendant.

COLT, J. The plaintiffs imported in July and September, 1883, from Prince Edward's island, and from Halifax, Nova Scotia, several thousand cases of tin cans containing canned lobsters. Each case contained 75 cans. On each can the defendant collector assessed a duty of one cent and a half, amounting to \$1,877.04. The plaintiffs contend that under the present law tin cans containing lobsters are not subject to any duty. A protest against the exaction of the duty was duly filed. The secretary of the treasury having on appeal affirmed the decision of the collector assessing the duty, the plaintiffs have brought this suit to recover back the amount of duty paid.

By the act of February 8, 1875, (Supp. Rev. St. 130,) anchovies and sardines packed in oil, or otherwise in tin boxes, are subject to certain duties; and then follows this provision:

"Provided, that cans or packages made of tin, or other material, containing fish of any kind, admitted free of duty under any existing law or treaty, not exceeding one quart in contents, shall be subject to a duty of one cent and a half on each can or package; and when exceeding one quart, shall be subject to an additional duty of one cent and a half for each additional quart, or fractional part thereof."

At the time this law was passed we find that a treaty, duly ratified, existed between the United States and Great Britain, (17 St. 863, 870,) by which "fish oil and fish of all kinds, (except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil,) being the produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward's island, shall be admitted into each country, respectively, free of duty."

The act of February 8, 1875, imposes a duty on tin cans containing fish of any kind, admitted free of duty under any existing law or treaty; and, there being an existing treaty by which fish of all kinds from Great Britain, Canada, and Prince Edward's island were admitted free of duty, and this importation coming from some of those countries, it is clear that, unless the law has since been changed, the duty in the case before us was properly assessed.

In the tariff act of March 3, 1883, (22 St. 488,) new and different duties are imposed on anchovies and sardines, and shrimps, or other shell-fish, are admitted free. It is contended by the plaintiffs that congress having established new and different duties on anchovies

and sardines, and having omitted the proviso as to cans containing fish, the latter is repealed by implication. But this can hardly be true, because the proviso is general in its terms, and applies to all kinds of fish. By changing the duties on anchovies and sardines, there is no reason to suppose that congress intended to repeal a general law imposing a duty on tin cans containing fish of any kind. While the law is in the form of a proviso, it appears to be in no way dependent on what precedes.

But it is claimed that the present importation was made under the act of March 3, 1883, which admits shrimps, or other shell-fish, free of duty, and that, therefore, it was not made under any existing law or treaty within the meaning of the act of February 9, 1875. These cans of lobsters were imported from Prince Edward's island, and from Nova Scotia. These countries are named in the treaty of 1871 between the United States and Great Britain as those from which fish of all kinds are to be admitted free of duty, with certain exceptions. The act of February 9, 1875, was plainly designed by congress to assess a duty on the cans containing fish imported from these countries under the treaty. In the act of March 3, 1883, section 11, we find it expressly provided that nothing in the act shall in any way change or impair the force or effect of any existing treaty between the United States and any other government. With this treaty still in force, we do not see how the plaintiffs can escape payment of the duty exacted. Nor can it be said that cans, being the usual and necessary box or covering for lobsters, are exempt from duty under section 7 of the act of March 3, 1883. Section 7 refers, in express terms, to sections 2907, 2908, Rev. St., and 18 St. 189, § 14, and repeals them. In our opinion, section 7 has no reference to the specific duty imposed on tin cans containing any kind of fish, and it in no way, expressly or by implication, repeals the act of February 9, 1875.

Judgment for defendant.

PHILLIPS and others v. CARROLL and others.

(Circuit Court, W. D. Pennsylvania. March 2, 1885.)

1. PATENTS FOR INVENTIONS—PATENT No. 227,061—INFRINGEMENT.

The first claim of complainants' patent, viz., in a flanging-machine the extension of the lower roll beyond the end of the upper roll for the support of the plate at the point of bend and to prevent the formation of a ridge or bead, *held* to be infringed by a machine which, before set to work, has the outer faces of the two rolls flush, but is so organized that, as the table upon which lies the plate to be flanged is raised to a perpendicular, the upper roll is pushed back the thickness of the plate.

2. SAME—ANTICIPATION.

The defense of anticipation considered, and *held* that the evidence shows a failure to reduce the conception to practical use and its abandonment, thus leaving the field of invention open to others.

3. SAME—INVENTION.

Held, further, that the patented improvement here involved more than the employment of mere mechanical skill, and may fairly be ascribed to the exercise of the inventive faculty.

4. SAME—DEFENSE OF WANT OF UTILITY.

Parties who employ a patented device ought not to expect a defense resting upon an alleged want of utility to find much favor with the court.

In Equity.

George H. Christy and Bakewell & Kerr, for complainants.

D. F. Patterson, John Barton & Son, Jas. T. Kay, and Burleigh & Harbison, for respondents.

ACHESON, J. This suit is upon letters patent No. 227,061, granted April 27, 1880, to the complainants (as assignees of Russell and McDonald, the inventors) for an improvement in flanging-machines. The invention, the specification declares, relates to the class of machines referred to in letters patent No. 166,715, issued August 17, 1875, to R. C. Nugent and others, and is designed to obviate an obstacle to the successful use of such machines arising from the tendency of the plate, while being flanged, especially if very heavy and very hot, to sag down a little, so as to form just outside the end of the lower roll an annular bead, bulge, or projection on the exterior base of the flange. To overcome this practical difficulty, and prevent the sagging action and bulging effect, the inventors lengthen the lower roll so that its outer end will extend beyond the outer end of the upper roll a distance equal, or nearly equal, to the thickness of the plate to be flanged, thus affording a proper support to the plate.

The first claim of the patent reads thus:

"(1) In a flanging-machine of the kind herein described, the extension of the lower roll beyond the end of the upper roll, in order to the better support of the plate at the point of bend, and prevent the formation of a ridge or bend, substantially as set forth."

The infringing machine, (which undoubtedly is of the same general kind described in the patent,) when at rest and before set to work, has the outer faces of the two rolls flush, or even, but the shaft of the upper roll is provided with a spiral spring, and as the table upon which lies the plate to be flanged is raised to a perpendicular, the upper roll is pushed back the thickness of the plate. Obviously, by means of this yielding spring the two rolls of the defendant's machine, during the operation of flanging, assume in respect to each other the relationship specified in the complainant's patent, and the practical result thereby contemplated is thus secured. It is therefore plain that the defendant's machine, as an operative apparatus, embodies the Russell and McDonald invention as embraced in their first claim. It indeed may be (although under the proofs this is an open question) that an automatic upper roll has an advantage over a rigid roll; but it is hardly necessary to say that the defendants are none the less infringers because of added improvements to the patented device. *De Florez v. Reynolds*, 3 Ban. & A. 292.

The defendants, however, maintain that Russell and McDonald were not the original and first inventors of the improvement here in question. To sustain this defense, reliance is placed upon the testimony of R. C. Nugent, as to his prior use of a lower roll having a supporting extension. The only instance of the use of a machine thus organized, of which he speaks with any degree of certainty, was the case of a small machine which he exhibited at the Cincinnati exposition. He says he had an idea the lower roll should project for the plate to rest on, and in that machine he allowed it to stick out he thinks about three-quarters of an inch beyond the top roll; but finding the extension of no use, and indeed an impediment, he had it cut off. This machine, it must be remembered, was not flanging for the market, but was merely on exhibition. Moreover, such light work as it did was cold flanging. It had nothing to do with the treatment of heavy hot plates. If, then, we should accept all that Mr. Nugent says on this subject as strictly true, it still follows, from his own account of the matter, that he not only failed to reduce his idea to practical use, but after an unsuccessful experiment abandoned his conception. Hence this field of invention was left open to others to enter. *Whitely v. Swayne*, 7 Wall. 685.

Again, it is contended that the supporting extension of the lower roll is within the scope of the prior Nugent patent, (No. 166,715,) and that, at the most, this improvement involved merely the exercise of ordinary mechanical skill. We search, however, the Nugent patent in vain to discover any suggestion or hint that the lower roll is to be extended beyond the end of the upper one, or that any useful purpose would thereby be subserved. On the contrary, the drawing shows the two rolls to be so arranged that their outer ends are in the same vertical plane, and the specification describes them as projecting an equal distance beyond the outside of the frame-work. The complainants, who had acquired the Nugent patent, in operating a flanging-machine built under it, experienced the practical difficulty already mentioned from the formation of a bead or ridge around the outside of the flanged plate. The solution of the problem, how to obviate this defect, involved—*First*, the discovery of the cause thereof; and then the application of an appropriate remedy. Now, the evidence indicates that neither the one nor the other was obvious. Indeed, the expert witnesses in this case yet differ as to the cause; and it is shown that it was not until after an experimental use of the complainants' original machine, extending over a period of perhaps several months, that the difficulty was met by the arrangement of the rolls devised by Russell and McDonald. I think, then, the improvement may fairly be ascribed to the exercise of the inventive faculty, and that it is the subject of letters patent within the general rule laid down in *Loom Co. v. Higgins*, 105 U. S. 580.

It is, however, strenuously urged that the organization of the rolls, as specified in Russell and McDonald's first claim, does not in fact

prevent the formation of the objectionable bead or ridge. But surely such allegation comes with ill grace from parties who have seen fit to copy this arrangement. If it is inefficacious, why do they use it? To this searching query no satisfactory answer has been given. The defendants' witnesses say the admitted difficulty arising from the formation of the bead or ridge can be and is obviated by placing the pivotal point of the table which holds the plate in a certain position with reference to the flanging rolls. I am by no means persuaded that in this they are correct. But if they are right, the defendants are at liberty to resort to that mechanical arrangement. So long, however, as they employ the patented improvement they ought not to expect a defense resting upon an alleged want of utility to find much favor with the court. But I may add that upon the question of utility the weight of the evidence, in my judgment, is clearly with the complainants.

Having reached the foregoing conclusions as respects the first claim of the patent in suit, I deem it unnecessary to determine whether or not there has been infringement of the second claim.

Let a decree be drawn in favor of the complainants.

PARKER, Trustee, and others v. Stow.

(Circuit Court, D. Connecticut. March 23, 1885.)

PATENTS FOR INVENTIONS—PATENTABILITY—ANTICIPATION—BABY CARRIAGES—MOVABLE TOPS—INFRINGEMENT.

Reissued patent No. 10,363, granted to Horatio G. Parker, trustee, August 7, 1883, for an improvement in children's carriages, compared with the patent issued February 11, 1868, to Bein & Ulrich, and the patent issued June 9, 1868, to Eliphalet S. Scripture, and the first claim of said reissue held valid, and infringed by sales by defendant of carriages having a canopy top, rigidly secured to two rigid arms, one depending on each side of the carriage, and pivoted at their lower ends to standards rigidly fastened on each side of the carriage body by means of friction-plates and a thumb-screw, which causes the plate to which it is attached to relax or renew its grasp, so that the top can be moved in any position, and may drop in front of the seat or behind it, or may be held in an upright or intermediate position.

In Equity.

Strawbridge & Taylor and Benj. F. Thurston, for plaintiffs.

John W. Konvalinka, for defendant.

SHIPMAN, J. This is a bill in equity to prevent the infringement of reissued letters patent No. 10,363, granted to Horatio G. Parker, trustee, August 7, 1883, for an improvement in children's carriages. The nature and distinctive features of the invention are described in the specification of the reissue as follows:

"This invention relates to that class of carriages having a square or canopy top, and its object is to enable the child to be seen and taken from the carriage by the attendant without leaving the position she must occupy for propelling it by the handle at the back; and also to enable the child's face to be protected from the sun or wind when they are in the direction in which the carriage is pushed; and it consists in such an arrangement and construction that

the top may be dropped in front of the seat as well as behind it, or fixed in an upright position over the carriage, or inclined at various angles; and also in the mechanism by which the same is accomplished, consisting of a pair of rigid arms secured rigidly to the carriage top and jointed to the recessed arcs attached to the body, the arms being provided with spring-bolts, or their equivalent, which engage with the recesses on the said arcs to retain the top in the desired position."

The first claim of the reissue is as follows:

"In a child's carriage, a rigid top or canopy, C, fixed upon the arms, A, pivoted to the sides of the body, so that said canopy may drop in front of the seat or behind it, or be held in an upright or intermediate position, substantially as and for the purposes set forth."

In order to ascertain the validity of the patent, the extent of the invention, if any was made, and the construction of the recited claim, a knowledge of the state of the art is necessary, and is obtained from two patents: one to Bein & Ulrich, of February 11, 1868, and the other to Eliphalet S. Scripture, of June 9, 1868.

The features of the Bein & Ulrich carriage were twofold: *First*, its seat and calash top were reversible, so that both could be placed at the different ends of the carriage body; and, *second*, the top "could be supported above the middle of the carriage to act as a sun umbrella." The first was the principal object of the carriage, and the mechanism which was apparently necessary to carry into effect that part of the invention could not accomplish the second object. In order to make the top reversible, its bows were pivoted to narrow iron plates, one depending upon each side of the carriage. The lower ends of these plates were pivoted to stiff bars or links, which also were pivoted at their lower ends to the sides of the carriage, so that there were three loose joints between the top and the sides of the carriage. Each of these links or bars rests upon a pin on the side of the carriage. In order to make the changes from one end to the other, the joints must move easily. To have the top stand vertically, a friction plate and screw are applied to the uppermost joint, and when so applied the top is rigid; but, as the middle joint is loose, it would tumble down if the carriage should be wheeled over a rough place, and if the middle joint was also provided with a friction contrivance, the top would swing from side to side, unless the joint at which the bar was pivoted to the carriage should be made firm.

The Scripture device is an ordinary buggy top, having three bows which are kept apart or brought together "by means of a substitute for the ordinary side brace, lettered E, F, H', in the patent. All these bows are pivoted upon a common pivot at each side of the seat, as in ordinary buggies, and to the place where they are pivoted there is applied a friction clamp, substantially the same as that shown in the carriage of defendants herein, by means of which the rearmost bow, called in the patent the back or main bow, *a*, can be held in any position between its lowermost position behind the driver and a position vertically above the back of the seat, and when it is in either

of these positions, or those intermediate between them, the other bows can be held in various positions with respect to it, by means of the contrivance, E, F, H'." The top cannot be placed at an angle in front of the seat.

The Bein & Ulrich carriage contained the germ of the invention of the plaintiff's patent. It had a top which, by means of a friction plate and screw, could be placed in a vertical position, and could be inclined to some extent either forward or backward, but could not be held in any position except against the end of the carriage, because the other joints were loose, and the top must tumble down when the carriage was used. The invention of Richardson, the plaintiffs' assignor, consisted in discarding the reversible seat and the reversible character of the top, and in changing the mechanism which supported the top so as to have a pair of rigid arms, one on each side of the carriage, rigidly fixed to a canopy top at their upper ends, and their lower ends pivoted to the sides of the carriage body, by either the described or equivalent means, so that the top can drop in front of the seat or behind it, or be held in an upright or intermediate position. The plate or arm or casting, by means of which it is pivoted to the sides of the body, is firmly attached to the body. In the patented device, the arms were jointed to recessed arcs attached to the body. The first claim is for the combination of the rigid top, the rigid arms pivoted at their lower ends to the sides of the body, by either the described or equivalent means, so that the specified result is produced.

The first question is whether the invention is patentable. The defendant insists that, in view of the Bein & Ulrich and the Scripture patents, it is without patentability. It cannot be successfully claimed that Bein & Ulrich anticipated the Richardson invention in the sense that their patent was infringed thereby, because the Bein & Ulrich arms were constructed upon a wrong principle and were a failure; but it is said that it would require no invention to attach the friction clamp of the Scripture patent to their middle joint. It is true that the described alteration would require no invention, but the device would still be a useless one, for the lower joint at the side of the carriage would be a fatal defect. All the joints must be furnished with friction plates, and even then the support of the top would be cumbersome and insecure. It is also said that no invention would be required to permanently secure the lower section of the Bein & Ulrich arm to the body of the carriage. The leading idea of the carriage, the reversible top, would then be abandoned, and to create a new device from an old one, by altering the structure so as to abandon the principal thing which the old was created to do, and so as to change the principle of the mechanism in order to accomplish what the old structure did not undertake to do, viz., hold the top in an intermediate position, seems to require invention.

The Scripture patent is not important upon the question of patentability. It used a friction-plate and thumb-screws to hold the rear-

most bow of a buggy top in any desired point. The other bows were held in the desired point by means of another contrivance.

The defendant sells children's carriages having a canopy top, rigidly secured to two rigid arms, one depending on each side of the carriage. These arms are pivoted at their lower ends to standards, rigidly fastened on each side of the carriage body. The arms are pivoted by means of friction-plates and a thumb-screw, which causes the plate to which it is attached to relax or renew its grasp so that the top can be moved in any position, and may drop in front of the seat or behind it, or may be held in an upright or intermediate position. This friction device was known to be a substitute for the spring-latch and notches of the plaintiff's patent before its date. The difference between the plaintiff's and the defendant's carriage is that the former has a longer arm than the latter has, and is jointed to a metal casting, which is attached to the body, and which consists in part of a piece of metal in the shape of an arc of a circle, the periphery being provided with a series of notches, and each arm being provided with spring-bolts. The arms of the defendant's carriage are pivoted, by means of friction-plates and thumb-screws, to standards or castings firmly attached to each side of the carriage body. As the patented invention did not consist in the form of the pivoting device, but was broad enough to include equivalents of the described form, infringement is proved.

There should be a decree for an injunction against the infringement of the first claim, and for an accounting.

THE EDWIN, etc.¹

(District Court, S. D. New York. February 18, 1885.)

1. SEAMEN—COMPLETION OF VOYAGE—SHIPPING ARTICLES.

Libelants shipped as seamen on board the bark *E.*, and signed articles for "a voyage from Iquiqui, So. Am., to Hampton Roads, for orders, and to any port or ports wherever the master may direct in the U. S. of America * * *; the voyage not to exceed eight calendar months." At Hampton Roads the vessel received orders for New York, where, on arrival, she discharged all her cargo. The libelants then left the vessel, and were entered in the log as deserters by the captain, who refused in consequence to pay the balance of wages up to the time they left. *Held*, that had there been other parts of cargo to be delivered at other ports, under orders received at Hampton Roads, the voyage would not have terminated until the delivery of the residue of the cargo. As it was, the voyage provided for by the shipping articles terminated at New York; the libelants were there entitled to their discharge, and could not be treated as deserters.

2. SAME—RATE OF WAGES.

One of the libelants shipped as second mate, but was afterwards justifiably disrated. *Held*, that he was entitled only to the same wages as the other able seamen for the remainder of the voyage.

3. ARTICLES SOLD TO SEAMEN.

Articles sold to seamen by the master during the voyage are allowed as an

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

offset to wages, at a rate not above 10 per cent. over the cost to the master. A charge in excess of that held unreasonable and oppressive. Act June 26, 1884.

In Admiralty.

Alexander & Ash, for libelants.

John R. Walker, for claimants.

Brown, J. In January, 1884, the libelants shipped as seamen on board the bark Edwin, and signed shipping articles for "a voyage from Iquiqui, So. Am., to Hampton Roads for orders, and to any port or ports wherever the master may direct in the U. S. of America or Dominion of Canada; the voyage not to exceed eight calendar months." The vessel proceeded to Hampton Roads, and there received orders to deliver the cargo in New York, where she arrived in June, 1884, and there discharged all her cargo. The libelants thereupon quitted the ship, taking their clothes with them. The master, claiming that the shipping articles bound them to the ship for eight months, entered them in the log as deserters, and refused to pay the balance of wages up to the time they left. The articles provided for only one voyage; not for one or more voyages during eight calendar months. In my judgment the one voyage stipulated for was ended at New York. New York was the destination fixed by the orders at Hampton Roads; and by the delivery of all the cargo at New York the voyage became ended there. There remained nothing more for the ship to do to complete that voyage. Thenceforward the ship had to seek new employment and a new voyage. Had there been other parts of the cargo to be delivered at other ports, under the orders received at Hampton Roads, the voyage would not have been terminated at New York, nor until the delivery of the residue of the cargo at the various ports designated. The libelants were entitled to their discharge in New York, and cannot, therefore, be treated as deserters.

Hendricks shipped as second mate at the rate of £6-6s. per month. He entered upon his duties January 25th. The testimony satisfies me that he was not competent for the proper discharge of the duties of second mate, and that he was justifiably disrated by the captain, according to the entry in the log on the eighteenth of February. After that date he is entitled to wages at the rate only of £3-10s., the wages of the other able seamen on the voyage. The articles sold to the seamen during the voyage, and charged against them in the master's account, are allowed at the prices charged, so far as these charges do not exceed an advance of 10 per cent. over the prices actually paid for them by the master. Ten per cent. is a reasonable compensation for his trouble, and the charges in excess of that are disallowed as unreasonable and oppressive. See Act June 26, 1884. The parties will probably be able to compute the amount due to the libelants upon the basis of this decision; if not, a reference may be taken for that purpose.

The libelants are entitled to costs.

BARTLETT and others v. HIS IMPERIAL MAJESTY THE SULTAN, etc.

(Circuit Court, S. D. New York. March 27, 1885.)

WAREHOUSEMAN—ADVERSE CLAIMANTS OF GOODS—INTERPLEADER.

A warehouseman whose lien for storage is not disputed cannot maintain a bill of interpleader to protect himself against the claim of his bailor and that of a third person who asserts an adverse title to goods stored with him as against the bailor, but must defend himself at law.

Motion for Injunction *pendente lite*.

W. W. Goodrich, of counsel, for complainants.

Butler, Stillman & Hubbard, for defendants.

Thos. E. Stillman and Adrian H. Joline, of counsel.

WALLACE, J. Complainants' motion for an injunction *pendente lite* is resisted mainly upon the ground that the complainants' bill is demurrable for want of equity. The bill shows that the complainants, as warehousemen, have in their possession a large quantity of arms, of the value of about \$900,000, which were deposited with them by the firm of Drexel, Morgan & Co., and for which, in July, 1882, complainants, at the request of Drexel, Morgan & Co., issued negotiable warehouse receipts; that shortly thereafter the defendant, the sultan of Turkey, claiming to be the owner of the arms, demanded them of complainants, and upon their refusal to give them up brought an action at law in this court for trover; that thereafter the American National Bank of Providence, claiming to be the holder of the warehouse receipts issued by complainants, demanded the arms, and upon complainants refusal to deliver them brought an action against them in this court. The bill also alleges that the Providence Tool Company and one Hunt claim some interest in the arms. The sultan, the American National Bank of Providence, the Providence Tool Company, and Hunt are made defendants in the bill, and the prayer is for an injunction restraining all proceedings on the part of the defendants in relation to the arms, and that they be required to interplead.

So far as appears by the bill, none of the parties claiming the property in complainants' possession dispute complainants' lien for storage and charges. The complainants, therefore, have no interests of their own to assert or protect further than to be relieved from liability to two or more different claimants of the property. None of the defendants claim title derived from the complainants. The American National Bank derives title from the bailors of the complainants, and the other defendants assert a paramount title.

The bill is a pure bill of interpleader, and presents the common case of a bailee who seeks to protect himself against the claim of his bailor and that of a third person who asserts an adverse title to the bailor. The authorities are decisive against his right to maintain an interpleader. It is sufficient to refer to *Crawshay v. Thornton*, 2 v.23F,no.6—17

Mylne & C. 1; Marvin v. Ellwood, 11 Paige, 365; *First Nat. Bank v. Bininger*, 26 N. J. Eq. 345. The hardship of the case has frequently been adverted to by the authorities; and in England a remedy has been given by statute. Common Law Proc. Act 1860, § 12. See *Attenborough v. St. Katharine's Dock Co.* L. R. 3 C. P. Div. 373, 377; Id. 450.

As is said by Judge STORY: "The party holding the property must defend himself as well as he can at law, and he is not entitled to the assistance of a court of equity, for that would be to assume the right to try merely legal titles upon a controversy between different parties where there is no privity of contract between them and the third person who calls for an interpleader." STORY, Eq. § 820.

The motion must be denied.

PIONEER GOLD MINING CO. v. BAKER.

(Circuit Court, D. California. February 9, 1885.)

1. MORTGAGE—MINING CORPORATION—CONTRACTS OF DIRECTORS—SHERIFF'S SALE.

In view of the facts clearly established by the testimony in this case, *held*, that the sheriff's sales set out in the complaint, had and brought about as they were, and the contract made by the directors, were, in effect, a mortgage for the purposes set out in the contract.

2. SAME—PAROL EVIDENCE.

Equity, to determine whether a written instrument is, in effect, a mortgage, hears parol evidence, not to contradict or vary the terms of the instrument, but to raise an equity superior to it, and give it effect according to the true intent and purpose of the parties.

3. SAME—PERSONAL OBLIGATION OF MORTGAGOR.

A mortgage may be created as well without as with an accompanying personal obligation of the mortgagor to pay the debt secured or attempted to be secured thereby. In the one case the property alone is charged with the lien,—is looked to solely by the mortgagee out of which to make his lien; in the other, he has the additional security of the personal obligation of the mortgagor.

4. SAME—DEBT CHARGEABLE ONLY AGAINST CERTAIN PROPERTY—MEASURE OF SECURITY.

A debt chargeable only against certain property is, in effect, simply a debt with limited means of satisfaction or enforcement; the value of the property charged with the indebtedness is the measure of the security afforded.

5. SAME—CONDITIONAL SALE OR MORTGAGE.

In cases of doubt whether a transaction was a conditional sale or a mortgage, equity will hold it to be a mortgage, as by so doing the rights of each party are preserved; the mortgagor is permitted, upon fulfillment of his contract, to save his property, and the mortgagee receives his just dues.

6. SAME—TENDER.

Under the circumstances of this case, considering the whole transaction as a mortgage, a tender upon the exact day was not strictly necessary to preserve the rights of the parties under the contract.

7. SAME—DECISIONS OF STATE COURT—STATE STATUTE.

Where, under the statutes of a state, a contract would be considered a mortgage, a United States court, in such state, in carrying such contract into effect, will be guided by the decisions of the supreme court of such state.

In Equity.

Stewart & Herrin, for complainant.

Van Clief & Gear and *John N. Pomeroy*, for defendant.

SABIN, J. This suit is brought by plaintiff to establish its right to redeem the Pioneer mine, situated in Sierra county, California, from defendant, under an asserted mortgage, alleged to have been created and effected by virtue of certain contracts and sheriff's sales set forth in the complaint. The suit was commenced on the twenty-second day of November, 1883, in the superior court of Sierra county, and was removed to this court for trial. It is difficult to epitomize or abridge the pleadings, and, at the same time, fully and clearly state the case of either party, plaintiff or defendant. I therefore refer to the complaint and answer at large, in this opinion. Plaintiff is the successor in interest to the Pioneer Mining Company, a corporation organized in 1874. It is necessary, *in limine*, to determine the legal effect of the contracts set out in the complaint, executed by Chapman and Baker, and by Chapman and Sayre and Baker. Were they made for the sole use and benefit of Chapman, or Chapman and Sayre, or were they made as and for the benefit of the Pioneer Mining Company? And if made for the sole benefit of Chapman and Sayre, is there any legal objection to their transfer by them to said company, and by said company to plaintiff? The complaint alleges that all of those contracts were made for the use and benefit of said company; that they were assumed and ratified by said company and duly transferred, with all rights of action thereunder, to plaintiff, prior to the commencement of this suit. As to their ratification and adoption by said company, and transfer to plaintiff, the testimony is ample, and the allegations of the complaint in this respect are fully sustained. The answer controverts the allegations of the complaint, now under consideration, and alleges that said contracts were made for the sole use and benefit of Chapman and Sayre, and denies their adoption or ratification by the Pioneer Mining Company, or their transfer by said company to plaintiff. The execution or delivery of Contract B is denied. This contract and its execution will be considered hereafter.

Upon the argument of the demurrer to the complaint, heard in this court, it was held that sufficient appeared upon the face of the complaint to entitle plaintiff to maintain this suit. 20 FED. REP. 4. The demurrer, of course, confessed the allegations of the complaint, and the ruling of the court was predicated upon the matters so pleaded and confessed. Are those allegations sustained by the proofs submitted?

We shall hardly understand and fully appreciate much of the testimony in this case, its value and significance, unless we constantly bear in mind the relations which existed between these parties—Chapman and Sayre, and defendant—from December, 1874, to June, 1883. During all of this time the testimony abundantly shows that their re-

lations were intimate, confidential, and trustful, and involving the expenditure of large sums of money. Prior to 1874, defendant, Baker, was the owner of a portion of the placer mining claims, which now constitute the Pioneer mine. He had been working some of these claims in the years 1872, 1873, and 1874, at a profit; taking out, perhaps, \$60,000 in the year 1874. In December, 1874, Baker effected a sale of the Pioneer mine to the Pioneer Mining Company, at a valuation of \$255,000. He received at the time of sale, in money, \$112,500; the obligations of the company for \$125,000 more, payable out of the proceeds of the mine, after \$100,000 had been realized therefrom; and 1,600 shares of the stock of the company. The Pioneer Mining Company commenced to develop the property, and carried it on at great expense until some time in the early part of 1876. The expense of opening the mine properly had been far beyond the estimates made at the time of purchase, and the receipts from the mine were probably far less than the company had expected. Fortuitous events had thrown the burden of the expense largely upon Chapman, he owning then three-fourths of the stock of the company.

Chapman, Sayre, and F. W. Hadley constituted the board of trustees of the company from its organization to the present time. Baker was familiar with all of the affairs of the company; knew who were its officers, and the interest which Chapman and Sayre had in the company. He lived near the mine and saw the work thereon as it was being done. He states in his testimony that this work was necessary to open the mine properly, and generally was well done. In 1876 the company was embarrassed for means to carry on its work, and probably discouraged at the results attained. Under these circumstances Contract A was executed, and the company resumed work, and continued it until some time in the year of 1877, when it became again embarrassed, and practically suspended work on the mine during the year. It did but little work in 1878. I am not certain that Baker at this time knew the extent of Hadley's interest in the company. I think he did not. Hadley's interest (100 shares of stock) was so small that it was not considered. Chapman and Sayre then, in 1878, owned all of the stock of the company, except the 100 shares held by Hadley, who was Chapman's clerk, and probably held this stock for the purpose of qualifying him to be a trustee in the company.

The Pioneer Mining Company was capitalized at \$640,000, divided into 6,400 shares, of the par value of \$100 per share. Chapman was the president of the company; was its controlling spirit, and had furnished by far the greatest portion of money expended on the mine. Baker knew these facts. Chapman and Sayre were considered to be, and virtually were, the Pioneer Mining Company; and all of these so dealt with each other from 1876 to 1883. Contract A was executed formally by the Pioneer Mining Company and Baker; Contract B, (if executed at all,) between Baker and Chapman. The lease of November 1, 1878, to Baker was executed by the Pioneer

Mining Company, formally. The contract of the same date, (Defendant's Exhibit 9,) drawn by defendant's attorney, is executed by Baker and Chapman, and the final agreement of December 20, 1878, drawn by Baker's attorney, is executed by Baker, of the first part, and Chapman and Sayre, of the second part.

It will be seen from these contracts that the parties executed them in various forms, attaching no importance to the mere matter of form, or the persons by whom executed. Each and all of these contracts, so executed, have reference to the property and to the indebtedness of the Pioneer Mining Company in terms, and that property and indebtedness only. Not a word appears in any of them as to any other property or indebtedness, or to any individual property or indebtedness of Chapman, or Chapman and Sayre. And in the correspondence, in evidence, extending from 1878 to 1883, between Baker and Chapman, and Baker and Sayre, Baker makes frequent reference to his desire to work out his claim against the mine and save it for "you,"—for the "old owners," for the "company." These terms are used interchangeably, and without the slightest obscurity as to his meaning. Baker secured important rights by these contracts, as will be seen hereafter. It is not possible that Baker, or his attorney, in drawing these contracts, for a moment considered them as the mere personal contracts of Chapman, or Chapman and Sayre. There was nothing upon which these contracts could act except the property of the Pioneer Mining Company, and nothing upon which they were intended to act except upon that property. There was no obligation resting upon the company to pay to Baker the \$125,000, or the \$100,000, as agreed upon in Contract A, except as it should be taken from the mine. That payment was a charge, a lien, *in rem*, solely upon the mine. The contract of December 20, 1878, was first drawn by Titus, Baker's attorney, to be executed only by Baker and Chapman. When the contract was shown to Sayre he suggested that he also ought to be a party to it, and it was redrawn accordingly by Titus, and so executed. I have no doubt that if that contract had been drawn to be executed by Baker, as the first party, and the Pioneer Mining Company, as the party of the second part, it would have been just as readily so executed by all of the parties.

In his verified answer to a suit brought by Hadley and Brown, growing out of this contract, in which suit they charged fraud in the execution of this contract, Baker says "he did not realize or think of any difference or conflict of interest between said corporation on the one part, and Chapman and Sayre on the other," and that "at the time of signing said agreement he would just as readily and willingly have signed a like agreement with said corporation, had he been requested to do so by said Chapman and Sayre." I have no doubt it was a mere inadvertence that it was not so drawn, instead of being drawn in the form as executed. I am aware of the danger

in attempting to explain contracts long after their execution. I think no such danger is to be feared in this case. The various contracts set out in the complaint must be considered together. They are interdependent, and have but one object and purpose running through them all, to-wit, the payment of the indebtedness of the Pioneer Mining Company, therein mentioned, in the manner and within the time therein specified, and then to surrender the property to its lawful owners. Baker was not making, nor was his attorney draughting for him, mere barren, idle contracts, to be executed by Chapman, or by Chapman and Sayre, which could be of no use to him,—which could give him no substantial rights. These contracts having reference only to the property and indebtedness of the Pioneer Mining Company, reciting in terms that it was the property of that company, were executed by Baker with Chapman, and with Chapman and Sayre, because he knew they were trustees of that company—were a majority thereof—and owned in 1878, as the answer admits, forty-seven forty-eighths of the capital stock of the company. They were carried into effect as though they were the contracts of the company, and Baker at all times derived the same advantage and benefit from them that he would or could have obtained under them had they been formally executed by the company, instead of being executed as they were.

The objects sought and the results attained were the same, in whatever form the contracts were executed. There is no charge of fraud in this case against any of the parties, in reference to the execution of any of these contracts; and the testimony raises no suspicion of fraud in the execution thereof. I doubt not they were executed in the utmost good faith by all of the parties thereto, and the testimony submitted establishes, beyond question or doubt, the fact that these contracts, whether signed by Chapman, or by Chapman and Sayre, were made on behalf of the Pioneer Mining Company, which they then represented and now represent, and were so intended at the time of their execution; and as such they were so considered and carried into effect by all of the parties thereto. Give these contracts this force and effect, and they are clear and unambiguous, and the subsequent conduct and action of these parties, Baker, and Chapman and Sayre, extending through five years and involving outlays of many thousands of dollars, is intelligible, reasonable, and logical. Considered as the mere personal contracts of Chapman, or Chapman and Sayre, and it is impossible to explain or understand them, or their object, or the subsequent action of the parties under them. Baker certainly cannot now complain of this construction being placed upon these contracts, after having enjoyed all of the benefits derivable therefrom during all of this time, while they were by him and all parties actually carried into effect as the contracts of the Pioneer Mining Company.

If recovery can be had in this suit as prayed for, it is immaterial

to Baker whether it be had by plaintiff, by the Pioneer Mining Company, or by Chapman and Sayre. The effect, as to him, is the same in any event. But were these contracts, any and all, the mere personal contracts of Chapman, or Chapman and Sayre, is there any legal objection why they might not transfer them to the company which they then represented, and now represent, whose property, in terms, these contracts solely dealt with, and for whose benefit they were made? I am not aware of any such legal objection. Nothing in any of the contracts forbids such action on their part; and the company which they represented might assume, ratify, and adopt them, if deemed advisable to do so.

Under the pleadings and testimony in this case, it is clear, upon the most familiar principles of law, that the Pioneer Mining Company could compel, if desirable, the transfer by Chapman and Sayre of these contracts to itself, made by its trustees, and dealing solely with its property, and could compel them to account scrupulously for all gains by them derived thereby. Clearly, Chapman and Sayre may do voluntarily what the law would compel them to do upon suit brought for that purpose. They are forever estopped under the record in this case from asserting any personal rights under those contracts, unless they shall first be retransferred to them by the plaintiff in this action.

As already observed, the evidence shows that these contracts were adopted, assumed, and ratified by the Pioneer Mining Company, and by it transferred to plaintiff. I may observe that I do not doubt the legal capacity of Chapman, Sayre, and Hadley to act as the trustees of the Pioneer Mining Company. They were its first duly-constituted trustees. No others have ever succeeded them; and it is not shown that any escheat or forfeiture of its corporate rights and franchises has ever arisen or been declared against that company. It may be further observed that the action of the board of trustees of said company, in assuming and ratifying these contracts, was duly ratified and approved by all of the stockholders of said company, prior to the commencement of this suit. There can be no doubt as to plaintiff's right of action.

A large amount of testimony is submitted in regard to the execution of Contract B, and this testimony is somewhat conflicting. The preponderance of evidence is that this contract was executed and delivered on about the ninth or tenth of August, 1878. In 1877 the Pioneer Mining Company had become embarrassed. The Bank of La Porte had obtained a judgment against the company, November 10, 1877, for about \$4,777; and on April 15, 1878, the California Powder Works recovered a judgment against the company for \$16,522.85. There was other outstanding indebtedness of the company, estimated at from eight to ten thousand dollars. Baker also held his claim against the mine for \$100,000 under Contract A. Baker, naturally, was solicitous about his claim, and more so as these judg-

ments were a lien upon the mine, and the other indebtedness of the company might at any time be put into judgment. Baker conferred with Daniel Titus, his attorney, in regard to his contract, A, with the company. He was anxious, if possible, to secure a lien on the mine which would take precedence of the two judgments above mentioned. It is evident that he and Chapman often conferred on this subject.

In the purchase of the Pioneer mine, and in developing the same, the Pioneer Mining Company had expended probably \$250,000,—perhaps more. Chapman had borne the greater part of the expense of developing the mine. He then, August, 1878, owned three-fourths of the stock of the company. Baker was fully aware of Chapman's heavy investments in the mine, and their personal relations were harmonious; and both were anxious to save themselves from loss, and to aid each other. On the twelfth day of August, 1878, Baker commenced a suit to foreclose Contract A. Titus testifies that he had the subject of bringing this suit under consideration for some months before it was brought; that he had a good deal of anxiety about it, and especially as to whether or not the suit could be maintained; and that he had no knowledge that it would not be defended. Such anxiety would be very natural on his part, considering the contract, and the judgment sought and obtained. The suit was brought, was not defended, and judgment for \$102,610 obtained, with interest at 7 per cent. per annum, and the same adjudged to be a lien on the mine, sale ordered, and a personal judgment decreed against the company for any deficiency arising on sale of the property. Prior to the commencement of this suit, John C. Hall had been the attorney of Chapman in sundry matters, not connected with this suit. At his request, Hall prepared the original draught of Contract B for Chapman. It was submitted to Titus, as Baker's attorney, for examination and correction, if desired. Titus examined it, changed it in several respects, and it was returned to Hall for engrossment, as corrected by Titus. It was so engrossed, as changed and amended by Titus, and as it now appears in the complaint. In the original draught, Hall, under a misapprehension, recited the fact that Baker *had* obtained a judgment, etc. As amended by Titus, it reads as we have it in the complaint: that Baker has a claim, etc., and is *about* to obtain judgment, etc.

In his direct examination, Titus is positive that this contract was not executed until after he had obtained this judgment for Baker, August 26, 1878, and that he would not have permitted Baker to execute the same as it now appears in the complaint, because it would have contained a false recital, to-wit, that he was "*about* to obtain a judgment," when in fact he had already obtained the judgment. But on cross-examination he admits that some of the changes suggested by him, as they appear on the slip now attached to the draught of this contract, are in his own handwriting, and, as before stated, this contract is set out in the complaint as it was corrected by Titus. I do

not think that he wrote any "false recital" to be engrossed into the contract. He, as Baker's attorney, wrote or suggested the recital that Baker "was about to obtain judgment," etc., and this would clearly have been false were not the contract to have been executed prior to the date of obtaining the judgment for Baker. If the contract was not intended to be, and was not in fact, executed by Baker until October 30, 1878, nearly three months from the time it was first draughted, it is certain that Titus then permitted him to sign it, containing a false recital of an important matter, and that Titus knew that such recital was false. Now I do not think that Titus did any such thing. Six years had elapsed from the date of that contract to the time when his testimony thereon was taken. I think he was mistaken in his recollection of the matter. August 9th, Hall charges Chapman \$50 for drawing this contract, and saw it no more thereafter. His account-book, containing this charge, was submitted to and examined by the court. The entry seems to be regular in all respects, and above suspicion. The testimony of Titus and Chapman as to the date of execution of this contract is conflicting. I cannot but think that, considering the deep interest which Chapman had in this matter, his recollection is the clearest and most accurate. From all of the testimony, I have little, if any, doubt that this contract was executed prior to August 13, 1878, the date of the commencement of Baker's suit on Contract A. But, whatever the fact may be on this point, it is morally certain that Baker and Chapman had a perfect understanding and agreement as to Baker's suit, and that no defense thereto would be made by the Pioneer Mining Company. Chapman's investment and interest in the mine at that time was nearly equal to, and perhaps greater than, the amount due Baker under Contract A. They wanted further time to make the money from the mine to pay these judgments and other debts, if possible. They had a common interest in the property, and they labored for a common object and result. If, as alleged in the answer, Contract B was never executed, it is most singular that Baker and Chapman, by mere accident and unwittingly, should have carried it into full and complete effect, of which there is no dispute, and should also have so fully embodied many of its important provisions into the contract of December 20th, following. These things could not have occurred by accident or chance; they did not so occur in this case.

I may have given this contract greater attention than its merits demand, as it is supplemented by the contract of November 1, 1878, (Defendant's Exhibit 9,) and is finally merged in the agreement of December 20th, following. I cannot think that these parties executed Contract B on the thirtieth of October, and only two days thereafter executed the contract of November 1, (Defendant's Exhibit 9.) On the twelfth of October, 1878, Baker entered into the contract with Baird and the California Powder Works, set out in the complaint. The objects of that contract are apparent. It gave precedence to the

judgment of the Bank of La Porte, then held by Baird, and to the judgment held by the California Powder Works. Sheriff's sales were to be made on those judgments, and also upon the Baker judgment; the legal title to the mine was to vest ultimately in Baker, and he was given 30 months from the date of obtaining title within which to pay off the two first-named judgments. These sheriff's sales were made accordingly, Baird bidding in the mine for the amount due on the first two judgments, and Baker bidding it in at \$60,000, on sheriff's sale a few days thereafter on his judgment. The sheriff's costs and commissions on the Baker sale amounted to about \$3,000. This sum Baker could not conveniently raise, and he settled with the sheriff for his costs, waived the sale, and took no certificate of sale from the sheriff on his judgment. This led to a modification of this contract, executed October 25th, as appears in the complaint. By this modification Baker was to assign his judgment to Baird, and the title was to be placed in Titus, who was to join with Baker in a mortgage on the mine to secure the payment of Baker's note for the amount due the California Powder Works, payable 30 months from date. These contracts were carried into effect when the title became vested in Titus, in April, 1879.

When Baker's note became due he was unable to pay it, and he naturally went to Chapman for aid. Chapman then advanced \$10,000 of his own money, paid it on Baker's note, and obtained an extension of one year on the balance. When this extension of time had expired, Baker was still unable to make any payment upon his note. He then, with the written consent of Chapman, mortgaged the mine to Morgan & Donahue, and Chapman took the money so obtained and paid the balance due the California Powder Works. There was a surplus of some \$1,400 in Chapman's hands of the money received from Morgan & Donahue, after paying the balance due the California Powder Works. This surplus Chapman retained, to apply on his advance of \$10,000, which is all that has been repaid to him on said advance.

After the clean-up of the mine for the season of 1883, Baker paid Morgan and Donahue the amount borrowed from them. It is insisted by defendant's attorneys that this Baker judgment was and is wholly void, and was of no advantage to Baker. I shall not discuss this point. It is sufficient that it served its purpose; and that it did prove advantageous to Baker, and Chapman and Sayre, there can be question. Its ultimate result was to gain for them, by means of the contract of October 12, 1878, more than three years' time within which to pay off the amounts due the California Powder Works, during which time Baker had the continuous and undisturbed possession of the mine; and the holders of the eight or ten thousand dollars of claims and demands against the Pioneer Mining Company, probably seeing no hope of realizing on their claims, forebore pressing the same against the company, with the exception of Ah Leen, mentioned in the com-

plaint. Baker states that he promised to pay this floating indebtedness, but has not done so. It is evident that Baker and his attorney, Mr. Titus, did not consider the judgment as void, nor did Chapman so consider it. Mr. Greathouse, the attorney for the California Powder Works at the time this judgment was rendered, had no doubt that it was collusively obtained. And he so charged Baker and Chapman, who appear not to have admitted the charge and yet not to have denied it. Chapman, however, insisted that no wrong was intended; that the California Powder Works would be fully paid; that he had made arrangements with Baker to that end. Chapman was the man to whom Greathouse principally looked for payment of these demands. He had guarantied their payment. Mr. Greathouse says that finally he consented to make the claims out of the property, and the contract of October 12th was accordingly executed. Chapman's active controlling influence and agency in procuring the execution of this contract cannot be doubted. The testimony of Mr. Greathouse puts this beyond question, and need not be reviewed. And the same is true of the contract made October 25th, modifying the one of October 12th.

Greathouse says that Baker and Chapman both asked him to permit the substitution of Titus in place of Baker, as the person to whom Baird should deed the mine, and that he consented thereto. Titus confirms this in his testimony. He says that Baker and Chapman both came to him and asked him to consent that the property be deeded to him by Baird, and that he so consented; that he did not remember that they assigned any reason, beyond their wish, for the change. It is needless now to inquire what that reason was. Baker and Chapman differ in their testimony on this point. March 26, 1880, Baker, in a letter to Chapman, says, "I would have held the deed myself if allowed." Again, on the twenty-seventh of the same month, he writes Chapman: "You must not forget that your objections, and fear to trust me to carry out this programme, produced the necessity to put it, the legal title to the mine, in other hands, where we could not control the situation." The controlling agency of Chapman in all these matters is too apparent to be denied. The contract of November 1, 1878, (Defendant's Exhibit 9,) executed by Baker and Chapman, followed. It is a supplement to Contract B, having the same general purpose and object, and is merged in the final contract of December 20th. On November 1st was executed the lease giving Baker possession of the mine for six months thereafter. On December 20, 1878, was executed the contract, called in the complaint the final or mortgage contract. Its object is apparent. It was to secure to Baker the payment of the sums therein mentioned and provided for, in the manner and within the time therein specified, and when this was accomplished to surrender the mine to its lawful owners. This and the other contracts set forth in the complaint had this one purpose. All tended to the same result. They dealt only with the property of the Pioneer

Mining Company,—could act on nothing else; sought only to discharge its debts and obligations as therein provided; were executed by Baker with Chapman, and with Chapman and Sayre, because they were the trustees of that company, and because Baker knew them to be such trustees; because he knew they owned nearly all of the stock of that company, and had always been the sole managers of its affairs. And from the dates of the several contracts to June, 1883, they were treated, considered, and acted upon by all parties thereto as the contracts of that company for its use and benefit, and not as the individual contracts merely of Chapman, or Chapman and Sayre. If this be not so, how has it occurred that Baker has had the undisturbed possession of this mine from November 1, 1878, to July 1, 1883? His only formal lease with the Pioneer Mining Company gave him possession of the mine for six months only, from November 1, 1878. Did he continue in possession under that lease, or under the contract of December 20th? If under the latter, then clearly it was treated and considered by all parties thereto as the contract of the company. The lease provided nothing about Baker's keeping accurate accounts of his expenses upon and receipts from the mine, and rendering such accounts to Chapman and Sayre. The contract of December 20th did so provide, and Baker, in his answer, alleges that he always has kept such accounts, and rendered them to Chapman and Sayre.

In view of the facts clearly established by the testimony, I cannot but hold that these sheriff's sales set out in the complaint, had and brought about as they were, and this final contract of December 20th, 1878, were and are in effect a mortgage—no more and no less—for the purposes set out in that contract. It will be conceded that a mortgage may be created in many ways. We are to consider, not so much the means used to that end, as we are to consider the legal effect,—the purpose and intention of the parties in the use of those means.

Equity often looks beyond the mere written instrument, hears parol evidence in regard to the same, not to contradict or vary its terms, but to raise an equity superior to it, and to give it effect according to the true intent and purpose of the parties. And a mortgage may be created as well without as with an accompanying personal obligation of the mortgagor to pay the debt secured, or attempted to be secured, thereby. In the one case the property alone is charged with the lien,—is looked to solely by the mortgagee out of which to make his lien; in the other, he has the additional security of the personal obligation of the mortgagor. A debt chargeable only against certain property is, in effect, simply a debt with limited means of satisfaction or enforcement; the value of the property charged with the indebtedness is the measure of the security afforded. And this is exactly the security taken by Baker in 1874, when he sold this mine for the balance of the purchase money, \$125,000. This arrangement was then sat-

isfactory to Baker,—was his voluntary contract,—and neither reason nor authority is suggested why this agreement is not legal and binding upon the parties thereto, and upon the property impressed with that lien. This agreement could have been acknowledged and recorded and made notice to all persons dealing with that property. It is evident that the stockholders of the Pioneer Mining Company did not wish to subject themselves to the possible personal liability of paying the whole purchase price of the mine, should it prove to be of little or no value. And this security was still acceptable to Baker, and by him accepted in Contract A. This arrangement was manifestly intended to give each party an opportunity of getting out of the mine the large amount of money which they respectively had invested in it; giving Baker the preference, and to Chapman and Sayre, or, which is substantially the same thing, the Pioneer Mining Company, the benefit of any surplus, and the mine itself, after the payment of Baker's claim against the mine.

It is urged by defendant that there is no valuable consideration for any of these contracts, and especially for the final contract of December 20, 1878. I cannot agree with counsel in this view. It may not be so important to inquire into the consideration of the contracts preceding the final contract of December 20th, as the others are merged therein. But I think, on examination of all of the contracts, we shall not fail to find them based on good and valuable considerations.

At the date of Contract A the Pioneer Mining Company had suspended work on the mine. Its outlays had been large, the returns small. It was under no obligation to go on forever, spending large sums of money upon the mine, with no returns. Baker held his claim against the mine for \$125,000, payable from the proceeds thereof. • If the mine could not be made to pay this amount, Baker's only remedy was upon his contract. Hence the Contract A. Baker surrendered his stock in the company, reduced his claim to \$100,000, payable as before, and he and the company surrendered all liabilities and obligations held by the one against the other, and the company promised to resume work on the mine. It did so, but probably not as effectively as was expected when the contract was executed. The complaint alleges that the company expended more than \$120,000 on the mine after the date of that contract. I am not able, from the testimony, to say what that amount was, but it was many thousands of dollars.

All of this, to a certain extent, inured to Baker's benefit. I cannot think there was lack of valuable consideration from either party in this contract. And this remark applies also to Contract B, and the contract of November 1st, (Defendant's Exhibit 9.) It can hardly be claimed that the contract of December 20, 1878, is without a valuable consideration. Without specifying others, it will be sufficient to observe that it gave Baker continuous possession of the mine for

four years, a thing he greatly desired, and the right to work it as he saw fit; and this has resulted, as he admits in his answer, in a clear profit to him of \$47,000 above all expenses. It is true that he has done this by making at times large advances; but this is what he contemplated, and knew he must do, when the contract was made. It has not been any the less valuable to him on this account,—the advances have been repaid,—and it is not denied that Baker has been in possession of this mine all this time under this contract, or certainly since the expiration of the lease of November 1, 1878, for six months. Its want of mutuality is hardly apparent, and would have found little support had Chapman and Sayre attempted to dispossess Baker of the mine without first complying with the terms of that contract. It is only by complying with those terms that plaintiff seeks to establish a right of action in this case. It may be further observed that by this contract Baker was to be paid interest on all of his advances at the rate of 1 per cent. per month. I am not certain, and do not now decide, whether or not, under this contract, this rate of interest is to apply to his judgment of \$102,610. If it does, it is an advantage to him of more than \$5,000 per annum, as his judgment drew only 7 per cent. per annum.

Baker testifies, in effect, that his understanding is that his judgment draws interest under the contract at the increased rate, and he so computes interest thereon in a partial statement of his account rendered to Sayre, (Plaintiff's Exhibit N.) If, however, this judgment is void, as insisted by defendant's counsel, it, of course, can draw no interest. And the same consideration extends, in a measure, to the agreement of December 16, 1882, extending this contract of December 20, 1878. Possession of the mine was to continue in Baker. This extension was granted for one of two purposes: either to be carried out in good faith by all parties thereto, or it was designed as a trap, a device, by which Chapman and Sayre, or the Pioneer Mining Company, should be induced unwittingly to allow the time for redemption to expire without offering to perform on their or its part. Nothing in the record supports the suggestion that the latter was the purpose of its execution; but were it fully established that such was its purpose, it would receive no countenance from the court; and no laches have arisen thereby, on the part of plaintiff, that would preclude recovery on that ground.

It is asserted and maintained with great earnestness that Baker now holds an absolute, indefeasible title to this mine, by virtue of the sheriff's sales on the judgments mentioned, free and clear of all equities arising from this contract of December 20, 1878; that in procuring such title he acted independently of, at arms-length, and adversely to, Chapman and Sayre, and all parties interested in the Pioneer mine. I must say that this assertion is not supported by a line or word of testimony in the case. The sales were made nearly as outlined in Contract B, and exactly as provided in the contract of Oc-

tober 12, 1878, executed by Baker, Baird, and the California Powder Works. This contract, as I have held, and as is abundantly shown by the testimony, was procured mainly by Chapman's influence, effort, and solicitation. His personal investment in the mine was then equal to, or greater than, the amount then due Baker. It is rather a play upon terms than a statement of fact to say that the debt of the Pioneer Mining Company to the California Powder Works was paid by means of these execution sales made by the California Powder Works. Those sales were merely a means to an end. The California Powder Works did not want the mine, and it agreed by this contract of October 12, 1878, to acquire and transfer the title thereto for a specific purpose only. Its demand was not paid until years after it acquired and transferred this title, as I have already shown.

The legal title to the mine passed to Titus about April 29, 1879, and was held by him until September 15, 1882, when he deeded the property to Baker, subject to certain mortgages, and subject to the rights of Chapman and Sayre, as set forth in the complaint. There can be no doubt, under the evidence, as to the perfect understanding and agreement of all of these men—Baker, Chapman, Sayre, and Titus—as to their rights in this property, under these sales, and the contract of December 20th. And there is no disagreement among them on this point. Titus held the title to the property as the trustee of both parties. He testifies that he understood that he had full power to sell the mine, but that he would not have sold it at any price without the consent of Baker and Chapman. Titus had long been the confidential attorney of Baker. He had also been the attorney for Chapman in some matters. Both reposed confidence in him. He drew this contract of December 20th, and the one of November 1st, and had carefully examined and amended Contract B before its execution. He knew all about the contract of October 12th, between Baker and Baird and the California Powder Works, knew its object and purpose, and had joined with Baker in the mortgage to secure Baker's note to the powder works. And he seems to have executed his trust honestly and faithfully. While Titus held this title, he and Baker and Chapman were all trying to effect a sale of the mine. Titus received two or more offers for the mine. These offers he reported to Baker and Chapman for their approval. When requested by Baker and Chapman he transferred the title to Baker, subject to the conditions mentioned, and Baker voluntarily so accepted it. His testimony on all of these matters is clear. The title passed to Baker, not as a purchaser, nor by operation of law, but simply at the request of Baker and Chapman to carry out their wishes and purpose in regard to the mine. Baker testifies that he always intended to carry out faithfully the contract of December 20th; that he never sought to avoid it. And his correspondence with Chapman and Sayre from 1878 to 1883, in evidence, is to the same effect. On March 26, 1880, Baker writes to Chapman: "You know how the title

came to be put in Titus' hands. I have made no definite arrangement with him." In the same letter, referring to certain services rendered by Titus in regard to the property, which Baker deemed advantageous, he says: "All of which was of as much to your advantage as mine in saving the property. * * * I have repeatedly urged upon you to make a definite arrangement with him, [Titus,] as it belonged more to you than to me to do it, as a certain amount of the proceeds of a sale comes to me and the balance to yourself and Sayre, as Titus fully understands. * * * I leave it between you to settle as you can. I would have held the title myself, if allowed; then all would have been easy." He urges Chapman to accept an offer of \$450,000 for the mine, and says, "I leave it in your hands." The following day, March 27th, he again writes Chapman: "With regard to what the Pioneer could be sold for at the very lowest, I can only say the matter rests wholly with you. I have made the last reduction on my claim that I ever shall, and the final contract defines what I am to have out of the property; whatever more is got out of it I freely yield as the contract specifies. * * * You must not forget that your objections and fear to trust me to carry out this programme produced the necessity to put it [the title] in other hands, where we could not control the situation, and therefore, if loss comes from it, you are the one on whom that loss justly falls and not on me." On September 24, 1882, after the title had passed from Titus to himself, Baker writes to Sayre: "I am now able to report that I hold the deed to the property, as contemplated in our original contract of redemption." November 25, 1882, he writes Sayre asking him to join in a bond, executed by himself and Chapman, to sell the mine for \$400,000, and says: "If we do not sell this mine I would rather have my money in sight than the mine clear of all incumbrances, with the risks which attend it. Hence I say I will never clear up the mine again without I do it for myself, and at the end of this extension I must have my money or be the sole owner of the mine, untrammelled by any redemption contracts."

There are many letters in evidence from Baker to these parties, and all to the same effect on this matter. His answer alleges that annually, after each clean-up, prior to June 23, 1883, he rendered to Chapman and Sayre a full, true, and correct statement of the amount and value of such clean-up, and of all proceeds and receipts from said mine, and of his disbursements in opening, developing, and working the same. He was under no obligation to do these except by that contract. Every act of Baker, in all this business, from the date of this contract of December 20, 1878, to the twenty-third of June, 1883, shows that he considered the contract to be in full force, and that he did not hold the title to the mine freed from its obligations. And his testimony is to the same effect. I cannot, therefore, give any weight to this assertion, now set up, as to Baker's title to the mine; that he holds it free and clear from the equities arising from the contracts

set forth in the complaint, and especially the contract of December 20, 1878. The assertion is not true, in fact, unless the testimony of every witness on this point is false.

It is further insisted that Baker gave the full market value of this property in the amount for which it was bid in on the execution sales made by the California Powder Works. And this is urged as evidence that the sales were, and were intended to be, absolute, with no resulting trust in favor of Chapman and Sayre, or the Pioneer Mining Company. We have shown, from the testimony, how these sales came to be made. I cannot but think that this inquiry is somewhat irrelevant. But the fact is shown, by every witness examined on this point, that this mine at that time had no market value, in the usual acceptation of that term. It was simply bid in for the amount of those judgments, interest, and costs. Baker testifies that he thinks its fair value at that date was about \$25,000 or \$30,000. And yet, a day or two thereafter, he bids, on his own execution sale, \$60,000 more for the mine, when clearly it had not enhanced \$1 in value. This seems inconsistent. The evidence submitted on this point, if it proves anything, proves too much. Some of the witnesses testify that they would not give four bits for the mine, while the aggregate of Baker's bids for it were nearly \$90,000. And we are to remember that Baker did not pay the amount for which the mine was struck off on the first execution sales. Chapman paid the first \$10,000, which was paid thereon in September, 1881, and the balance was not really paid until it was paid from the clean-up of the mine for the season of 1883, as testified to by Baker. Whatever may have been the opinion of various persons as to the real or speculative value of the mine in October, 1878, it is clear that Baker, and Chapman and Sayre, all considered it to be of great value, far beyond \$25,000 or \$30,000. In 1880 Baker urges Chapman to consent to a sale of the property at \$450,000. In 1882 Baker asks Sayre, by letter, to join with himself and Chapman in a bond to sell the mine for \$400,000. While Titus held the title to the mine, from April, 1879, to September, 1882, he, Baker, Chapman, and Sayre were all trying to effect a sale. Titus seems to have had at least two offers for the property: one at about three hundred or three hundred and fifty thousand dollars, and the other at a larger sum. I cannot but think that Baker, Chapman, and Sayre were the best judges of the value of that mine, and their judgment in this respect is best shown by their actions relative to its sale, and the price asked therefor. But in this case it makes no difference if Baker's purchase on the execution sales was at the then full value of the mine; the whole transaction was still in effect only a mortgage. In cases of doubt whether a transaction was a conditional sale or a mortgage, equity will hold it to be a mortgage. By so doing, the rights of each party are preserved; the mortgagor is permitted, upon fulfillment of his contract, to save his property, and the mortgagee receives his just dues, and is entitled to no more.

We pass to the alleged tender made by Chapman, in compliance with this final contract of December 20, 1878. Prior to June, 1883, there had been correspondence between these parties, and especially between Baker and Sayre, in reference to the redemption of the mine, the amount required therefor, etc. About June 19, 1883, Chapman applied to Baker for a further extension of time to redeem under the contract of December 20th. He wished it extended until after the clean-up of the mine for that year. This would give Baker the benefit of that season's products, then supposed to be large, and, as shown by Baker, was in excess of \$87,000. This request Baker refused, and he then informed Chapman that redemption must be made by June 22d, or the right to redeem would cease on that date. Baker then thought that the extension of time on this contract of December 20, 1878, made December 16, 1882, expired June 22, instead of July 1, 1883. Chapman then made arrangements by which he was to obtain \$100,000, and whatever more might be required, with which to redeem the property. On the twenty-eighth of June, following, Chapman applied to Baker for a statement of his accounts, and to know the amount required for redemption. He had, prior to this, written Baker to have such accounts prepared.

This statement Baker did not and could not furnish. His books were not there, at the mine, when the request was made, and he states in his testimony that he had not made up his accounts since October, 1882. The bills were not in, and expenses not known. It is evident from the testimony, and chiefly that of Baker, that Baker could not have furnished a true or correct statement of his accounts, or the amount justly due him on July 1, 1883, if he had wanted to do so, and it is equally evident that he did not want to do so. He then thought the time for redemption had expired, and, as he states, he "stood upon his legal rights." By his neglect to have his accounts ready he put it out of the power of Chapman and Sayre to comply with the exact terms of the contract. It was not their fault that they did not know what amount to tender Baker on the first of July, 1883, in redemption of the property. Chapman had prepared the means, in good faith, with which to redeem, but Baker could not tell him the amount required. It is true that Chapman did not then have the money with him to make an actual tender of a definite sum, but if he had produced an unlimited sum it would in no way have aided the matter. Neither he nor Baker could tell the amount due the latter. I consider that there was a substantial compliance with the contract in this respect on the part of Chapman and Sayre, as Chapman's purpose was to pay the full amount due Baker under the contract. Baker's refusal to allow redemption was based solely upon the fact, as he understood it, that the time for redemption under the contract of December 20, 1878, and the extension thereof, had then expired. He did not object that no tender of the amount due under the contract had been made. He stood upon his legal rights, independently of

any tender. It may further be observed that, considering this whole transaction as a mortgage, as I do, a tender upon the exact day was not strictly necessary to preserve the right of the parties under that contract. The right of a mortgagee to redeem is not limited to a strict performance on his part upon the very day his mortgage becomes due.

I have thus endeavored to review this case upon its merits, as established by the testimony. It is seldom that a bill, in a contested case, is so fully sustained by the evidence. I am aware that Chapman and Sayre commenced a suit June 29, 1883, on this contract, seeking its enforcement. Whether or not that suit was well or ill advised I am not called upon to say. This, however, is true, under the evidence in this case: that if they had recovered in that suit in their own names, it would have inured to the use and benefit of the Pioneer Mining Company. A recovery therein would not have changed the facts established in this case, nor would it have precluded the Pioneer Mining Company from asserting its rights. It is of little moment to Baker what party, as plaintiff, holds the equity of redemption under that contract of December 20, 1878, since his rights thereunder will be fully protected, and performance decreed and executed, before he will be called upon to convey the property. The court has determined, in this suit, that plaintiff now holds that equity of redemption, and may enforce it against the defendant. Hadley and Brown also commenced a suit upon this contract, in July, 1883, charging fraud in its execution. Both of these suits were dismissed by the parties who brought them, and were never heard upon their merits. They have but little bearing in this case, which is heard upon the issues raised by the pleadings, and must be decided upon the facts established by the testimony, and the law applicable thereto.

I do not deem it necessary to discuss at length the doctrine of mortgages as applied to this case. These contracts were made under the Code of California, and are subject to its provisions. And this court, in carrying the contracts into effect, will be guided by the decisions of the supreme court of California in construing the provisions of the Code applicable thereto. Under the Code of California, and under the generally recognized doctrine of mortgages, this transaction, as a whole, can only be deemed a mortgage. It is of little consequence whether we consider Baker as a mortgagee, in possession by consent, or as a trustee, holding the title to this mine in trust. When the conditions upon which he holds that trust are fully complied with, he may, at any time, be called upon to surrender that trust.

I deeply regret the necessity which compelled the bringing of this suit. It is most unfortunate that these parties, after years of hearty co-operation, constant courage, struggle, and labor, involving great expenditures of money, and at the last moment, when their long-deferred hopes were almost realized, should have come to this painful

and costly disagreement, and so have thwarted their common understanding and enterprise. I cannot but think that it never would have so happened had not Baker become so erroneously impressed with the idea that the extension of the contract of December 20, 1878, expired June 22, instead of July 1, 1883. He testifies, over and over again, that it was always his intention and purpose at all times faithfully to carry out that contract, and his every act done under it confirms his testimony in this respect. I find the following numbered allegations of the complaint, as numbered therein, sustained by the testimony submitted, to-wit: Nos. 1 and following to and including No. 16, with the exception of the last sentence thereof, in the words, "but the mortgage to Messrs. Morgan & Donahue still remains unpaid, and a lien upon the mine." Baker testifies that he has paid this mortgage. Also, Nos. 17 and following to and including No. 22. The allegations in subdivision 23 as to Baker's secretly retorting amalgam, and his insolvency, are not sustained. His possession of the mine and working the same are conceded.

Let a preliminary decree be entered in favor of plaintiff, if desired, in accordance with this opinion, and the case be referred to the standing master in chancery of this court to take an account between the parties and report the same to the court.

LECLANCHE BATTERY CO. v. WESTERN ELECTRIC CO.

(Circuit Court, S. D. New York. March 27, 1885.)

1. TRADE-MARK—NAME OF NEW ARTICLE—RIGHT TO USE OF.

When an article is made that was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; and the name thus given to it becomes public property, and all who deal in the article have the right to designate it by the name by which alone it is recognizable.

2. SAME—NAME, WHEN NOT A TRADE-MARK.

A name alone is not a trade-mark when it is applied to designate, not the article of a particular maker or seller, but the kind or description of thing sold.

3. SAME—IMITATION OF LABELS—INJUNCTION.

Although the name applied by a complainant to his goods may not afford protection as a trade-mark, where others are guilty of imitating the labels used by him in making sales thereof, they will be enjoined.

In Equity.

Dickerson & Dickerson, for complainants.

Geo. P. Barton, for defendant.

WALLACE, J. The complainants cannot maintain their claim to the exclusive right to use either the word "Disque" or "Pile-Leclanche" as a trade-mark, when applied to the batteries manufactured and sold by them. As owners of the right to manufacture and sell the Leclanche batteries until the expiration of the patent granted to the

assignee of Leclanche, they have been accustomed to use the word "Disque" on the labels pasted on the glass jar which forms part of the battery, and the word "Pile-Leclanche" blown in the glass. Neither of these words are arbitrary names selected to denote the article as the production of a particular proprietor. They are appropriate, and are intended to indicate that the batteries are of a specified form, and are made according to the patent of Leclanche. "Disque" describes the form of the battery, and is used to distinguish it from the prism and other forms of porous-cup batteries. "Pile" is synonymous with battery, and "Pile-Leclanche" is the designation in French of Leclanche's battery.

When an article is made that was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; and the name thus given to it becomes public property, and all who deal in the article have the right to designate it by the name by which alone it is recognizable. *Hostetter v. Fries*, 17 FED. REP. 620; *Singer Manuf'g Co. v. Stanage*, 6 FED. REP. 279. As soon as Leclanche invented his battery in France, it was necessarily given the name "Pile-Leclanche," and that name could never again be appropriated exclusively as a trade-mark even by the inventor himself.

A name alone is not a trade-mark, when it is applied to designate, not the article of a particular maker or seller, but the kind or description of thing which is being sold. *Singer Manuf'g Co. v. Loog*, 15 Reporter, 538; *Wheeler & Wilson Manuf'g Co. v. Shakespear*, 39 Law J. Ch. 36; *Young v. Macrae*, 9 Jur. (N. S.) 322; *Canal Co. v. Clark*, 13 Wall. 311.

The defendants have imitated the label of the complainant to the minutest details, except the signature at the bottom. The complainant is entitled to protection against the unlawful competition in trade thus engendered by the simulation of its label; and upon this ground a decree is ordered in its favor.

See *Wilcox & Gibbs Sewing-Machine Co. v. The Gibbens Frame*, 17 FED. REP. 623; *Burton v. Stratton*, 12 FED. REP. 696, and note, 704, and *Shaw Stocking Co. v. Mack*, Id. 707, and note, 717.—[ED.]

RANDOLPH v. QUIDNICK Co. and others.

*(Circuit Court, D. Rhode Island. March 20, 1885.)***EVIDENCE—COMMUNICATIONS MADE TO COUNSELOR—WHEN PRIVILEGED.**

Communications made to a counselor in the course of his professional employment, by persons other than the client or his agents, are not privileged. The rule extends only to communications made by or on behalf of the client.

In Equity. Opinion of court on request of the examiner for instructions.

W. H. Baker, for complainant.

C. H. Parkhurst, for respondent.

CARPENTER, J. This is a bill brought to determine the title to certain shares of the capital stock of the Quidnick Company. In the taking of the testimony before the examiner, Richard B. Comstock, Esq., a counselor at law, was called as a witness by the respondent. Having testified that he was of counsel for the complainant from some time in 1879 up to about December, 1883, he was asked the following questions:

"*Interrogatory 3.* Did you have any interview while you were counsel for Evan Randolph with Ex-Governor Sprague, with reference to 4,022 shares of the capital stock of the Quidnick Company, to which Evan Randolph claimed title? If so, please state fully what took place at these interviews, and when those interviews took place."

Counsel for the complainant objected to the questions on the ground that it called for the disclosure of a communication which was privileged; whereupon the witness declined to answer unless so instructed by the court. Having further stated that he received into his possession a certain certificate of stock in August, 1883, the witness was asked as follows:

"*Interrogatory 6.* Had you, previous to the delivery of said certificate to you, had any interviews with Ex-Governor William Sprague, or with Benjamin F. Butler, his counsel, or with Andrew B. Patton, also his counsel, concerning said certificate or the transfer of said shares? If so, please state what those interviews were, and where they took place."

Counsel for the complainant objected on the same ground as before, and the witness declined to answer. The witness further testified that he caused an attachment to be made on a judgment held by Evan Randolph against William Sprague and Amasa Sprague, upon funds in the hands of one Jenks, and that the information on which he acted in making the attachment did not come to him from the complainant or from any person claiming to act for him. He was then asked as follows:

"*Interrogatory 13.* Did said information come to you from William Sprague or Amasa Sprague, or any one claiming to act for them or either of them?"

Counsel for the complainant objected on the same ground as before, and the witness declined to answer. The examiner reports

these facts, and he, together with the respondent, prays the instructions of the court.

The question in this matter is whether communications made to a counselor in the course of his professional employment by persons other than the client or his agent are privileged. I find no sufficient authority for the proposition that they are so privileged. The rule extends only to communications made by or on behalf of the client. *Crosby v. Berger*, 11 Paige, 377, and cases cited; Steph. Dig. Ev. art. 115; Best, Ev. p. 567, § 581.

Two cases are cited by the complainant in support of his view. *Greenough v. Gaskell*, 1 Mylne & K. 98, decided by Lord BROUGHAM in 1833, "does indeed appear," to use the words of Chancellor WALWORTH, "to extend the privilege further than the previous cases would warrant, and beyond the principle upon which the privilege is founded." That case appears to me, however, to be contrary to the current of decision and opinion, both before and since it was decided. The case of *Whiting v. Barney*, 30 N. Y. 330, also cited by complainant, does not appear to me to have any bearing on this question.

An order will therefore be made requiring the witness to answer the interrogatories.

UNITED STATES v. SAN JACINTO TIN CO.¹

(Circuit Court, D. California. March 23, 1885.)

1. PUBLIC LANDS—MEXICAN GRANTS—CONFIRMATION AND PATENT.

The confirmation and final location of a Mexican grant is conclusive against the United States, in the absence of fraud, and to set aside a patent the fraud must be extrinsic and collateral to the matter determined, and not matter upon which the decree was rendered.

2. SAME—FRAUD—EVIDENCE.

The evidence to sustain charges of fraud against a number of government officers must be conclusive. Evidence held insufficient.

3. SAME—REVIEW BY COURT.

The courts cannot review mere errors in location of Mexican grants by the proper officers.

4. SAME—UNITED STATES AS SUITOR.

When the United States enters a court as a litigant, it waives its exemption from legal proceedings and stands upon the same footing with private individuals, and if, on a consideration of all the circumstances of the case, it be inequitable to grant the relief prayed against a citizen, such relief will be refused.

5. SAME—LACHES AS DEFENSE.

Although, on grounds of public policy, no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them, if different from the finding made, the changed condition of the parties and the property from lapse of time, the difficulty from this cause of meeting objections which might, perhaps, at the time have been readily explained, and the acquisition of interests by third parties upon faith of the decree, — are elements which will be considered by the court in determining whether it be equitable

¹Affirmed. See 8 Sup. Ct. Rep. 850.

to grant the relief prayed. All the attending circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him.

6. SAME—PATENT SUSTAINED.

As, under the circumstances of this case, it would be inequitable to vacate the patent, and impossible to place the parties *in statu quo*, the patent should not be annulled.

7. SAME—RIGHTS OF STOCKHOLDERS.

After a great lapse of time strangers purchasing stock in a corporation without actual notice of frauds committed before the creation of the corporation, and to which the corporation, as such, was no party, affecting title to lands held by the corporation, ought to be entitled to rely on the decrees of the United States tribunals affirming such titles.

In Equity.

M. G. Cobb and G. Wiley Wells, for complainant.

Stewart & Herrin, for defendant.

Before SAWYER and HOFFMAN, JJ.

SAWYER, J. This suit is brought by the United States, at the instance of, and upon an indemnity against costs given by, R. S. Baker, to accomplish in another form, in favor of the same and similar interests, the objects sought in *Manning v. San Jacinto Tin Co.* 7 Sawy. 422; S. C. 9 FED. REP. 726. In the cases, in many respects similar, of *U. S. v. Flint*, *U. S. v. Throckmorton*, and *U. S. v. Carpenter*, 4 Sawy. 42, affirmed in *U. S. v. Throckmorton*, 98 U. S. 61 and in other cases, it has been settled that the action of the proper authorities of the United States in confirming and finally locating Mexican grants in California is conclusive, unless there was fraud in the proceedings; and that the frauds authorizing the vacation of a patent must be frauds extrinsic or collateral to the matter tried by the first court or other tribunal, and not frauds in the matter upon which the decree was rendered or patent issued. The only allegations of fraud upon which the United States rely to take this case out of the established rule, relate to the location of the grant, and are found fully stated in paragraph 13 of the bill. The charges are that at the date of the location of the grant Edward Conway was chief clerk in the office of the United States surveyor general of California, and performed in relation to the location all the duties of the surveyor general; that George H. Thompson was the deputy surveyor who made the survey and location; that R. C. Hopkins, who made a report on the subject for the information of the surveyor general, was keeper of the archives in the office of the surveyor general; that B. C. Whiting was United States attorney for the district, representing the United States; that Joseph S. Wilson was commissioner of the general land-office at Washington, and the party who approved the location as such commissioner; that they all, at the time of the performance of their official duties in the premises, and at the time of the location of the grant and issue of the patent, owned interests in the *rancho* located and patented, the legal title being held by Conway in trust for himself and them, and other associates; that Conway, acting for the surveyor

general, in his official capacity directed the operations of the office, and in what manner the grant should be located, and that all these officers fraudulently conspired together to locate the land, and have the location finally approved by the commissioner and the secretary of the interior, on lands not within the exterior limits of the grant, and that this was done in order to fraudulently cover certain valuable tin mines, and that by this fraudulent conspiracy of government officers the grant was so wrongfully located and patented wholly without the boundaries of the grant. If these charges are not satisfactorily proved, there is no ground upon which this bill can be sustained.

The first peculiarity of the allegations that strikes the mind is the surprising and seemingly reckless charges made against so many prominent government officials,—all, indeed, from and including the commissioner of the general land-office himself at Washington down to the humblest officer who could have possibly had anything to do with the matter; and some of them personally well known for many years to every judge in the circuit as men having unblemished reputations for probity and honor. The charges are carefully made on information and belief, and not verified by any oath, 16 years after the issue of the patent. But every fact and implication of a fraudulent character, and not wholly consistent with honesty, entire good faith, and innocence, is categorically and distinctly denied in the sworn answer to the bill; and the burden of proof is thrown entirely upon the United States.

In our opinion, the proofs utterly fail to establish the fraudulent combination, or any of the acts of fraud charged. The direct proofs are all the other way. The uncontradicted, direct evidence is to the effect that no one of the parties charged, who was in a position to commit the fraud, except Conway, had any interest whatever in the grant at the time of the survey and location of the grant, or of the issue of the patent. Conway had purchased the grant and owned it in his own right, or for parties other than the persons charged with the frauds. His title was on record and known, or should have been known, to everybody. He called the attention of the surveyor general to his interest, and, owing to the delicacy of his position, offered to resign, but was retained in the office. For this reason, however, he refrained from acting in the matter, and had nothing to do officially with the location. This is the direct testimony, and it is uncontradicted.

The bill was, evidently, drawn with the decisions of the supreme court in similar defeated cases before the pleader, who, it would seem, was more solicitous to draught a bill that would be proof against a demurrer than to make it conform to the evidence under his control, to sustain the vital allegations of fraud. It is true that some time after the issue of the patent, upon the organization of the San Jacinto Tin Company, the other parties named, with many other prominent citizens in California, Pennsylvania, Washington, and elsewhere, took stock in the corporation. But at that time there was no reason why

they should not do so. The location was commenced under Surveyor General Beale, and completed and confirmed under Surveyor General Upson; some modifications having been made from time to time to accommodate the location to the demands of claimants of the adjacent lands; every step of the location having been contested by parties having their own adverse interests to protect, and these parties, too, the predecessors in interest of the real parties in this suit. The testimony fails to show that any of the parties charged with fraud had any interest in the lands before or at the time of the location and issue of the patent, except Conway, and fails to show any act of fraud on the part of any party alleged, while the direct testimony is to the contrary. Certainly, gross frauds should not be inferred alone from facts that are as consistent with innocence as with guilt, against a large number of distinguished men in high official positions, enjoying excellent reputations for honor and integrity, or regarded as established without the most convincing proofs. The evidence being wholly insufficient to establish any of the frauds charged, the only equitable or available ground upon which the bill rests utterly fails. We cannot review any mere errors of location. Says Mr. Justice FIELD in *U. S. v. Flint*, 4 Sawy. 61, affirmed in 98 U. S. 61:

"As to the alleged error in the survey of the claim, it need only be observed that the whole subject of surveys upon confirmed grants, except as provided by the act of 1860, which did not embrace this case, was under the control of the land department, and was not subject to the supervision of the courts. Whether the survey conforms to the claim confirmed, or varies from it, is a matter with which the courts have nothing to do. That belongs to a department whose action is not the subject of review of the judiciary in any case, however erroneous. The courts can only examine into the correctness of a survey, when, in a controversy between the parties, it is alleged that the survey made infringes upon the prior rights of one of them, and can then look into it only so far as may be necessary to protect such rights. They cannot order a new survey or change that already made."

Upon the question of fraud we state the result of our examination of the testimony without going into details. It would be an unprofitable task to discuss the vast mass of testimony, relevant, and irrelevant, in detail. But it may be well to refer to the great central fact upon which the other charges of fraud are based, and around which they are sought to be grouped, and upon which they rest for inferential support. It is confidently assumed on the part of complainants that the location of the land as patented is, palpably, wholly outside of the exterior limits described in the original petition, Mexican grant, and the decree of confirmation; that this is so obvious that the grant must have been willfully and fraudulently located where it is. This is an assumption that in our judgment is wholly without justification in the documentary and other evidence in the case. Upon a careful consideration of the subject we are of the opinion that the most that can be reasonably said against the location is that the record presents a fair case for an honest difference of opinion; that a

plausible argument can be honestly made in support of either side of the proposition. An erroneous location is certainly not so obvious as to necessarily stamp it as a fraud. The petition filed in February, 1846, asks a grant of land "within the limits of the known *ranch*o of San Jacinto, whose *general desino* is in the office of the secretary of the governor, and shows in its *total extension* to be coterminous with the *ranchos* of Jurupa and San Bernardino towards the north, Temecula on the south, Huapa on the west, and San Gorgonio on the east."

The sub-prefect reports the land as being "the *remainder* which has been left untitled of the tract of San Jacinto Viejo and Nuevo, and which is *coterminous with the lands expressed in the petition*, and is shown by the *desino*, which I have before me." And the governor, upon said report, grants the "surplus land in San Jacinto Viejo and Nuevo as shown in the *general desino*, which appears in the foregoing." And in the final grant it is stated to be "that which results as a surplus in the *ranchos* San Jacinto Viejo and Nuevo, as shown by the *general desino* of both *ranchos*, which appears in the *expediente*." The language of the decree of confirmation in the United States district court, which is controlling, is: "The lands hereby confirmed are the '*sobrante*,' or surplus, remaining within the boundaries of the *tract of land called 'San Jacinto,'* as the same is represented and described in the map of said tract contained in the *expediente* of Miguel Pedorena, filed in this case and referred to in the grant, over and above certain lands granted to Jose Antonio Estudillo, and certain other lands granted to Miguel Pedorena, *within the aforesaid boundaries*, [that is, the boundaries of the *whole* tract called '*San Jacinto*,'] to the extent of eleven square leagues of land; and if the said *sobrante*, or surplus, within the *said boundaries*, should be less than eleven square leagues, then confirmation is hereby made to such less quantity." There was no juridical possession given of the grant, as the country passed to the United States before the performance of this act. The external boundaries were therefore left indefinite, and to be determined by the boundaries of the surrounding "coterminous" *ranchos*.

There had been two prior grants out of the tract known as "San Jacinto,"—one called "San Jacinto Viejo," or "Old San Jacinto," and the other "San Jacinto Nuevo," or "New San Jacinto,"—and the grant in question was out of the surplus, after satisfying the two former grants. There was a *desino* attached to the *expediente* in the new San Jacinto grant, prepared with special reference to the petition for that grant, and this was referred to in the several steps in the *expediente* of the *sobrante* grant in question. This is a rough proximate sketch made by O'Farrell without an instrumental survey, and, like most of the *desinos* appended to the petitions for Mexican grants, indefinite, but much better, more particular, and artistic than usual. This *desino* has a dotted line drawn around a tract, which is also divided by a dotted line to represent the two tracts of old and new San Jacinto,

which is represented as bounded by the Jurupa, San Bernardino, San Gorgonio, Temecula, and Huapa *ranchos*. The name of each outlying *ranchito* is located in its supposed proper place, and all the *ranchos* together inclose the land supposed to be the whole tract known as San Jacinto. Any one reading the *expediente* and decree of confirmation, and looking at the *desino*, would say at once that the tract known as "San Jacinto," out of which the three tracts, Old San Jacinto, New San Jacinto, and El Sobrante San Jacinto were to be satisfied, included all the land, be it more or less, lying within the boundaries of the surrounding *ranchos* named. This was evidently the idea of the judge who confirmed the grant, which by the decree was to be satisfied out of the "surplus remaining within the boundaries of the tract of land called 'San Jacinto;'" not out of the tract called "Old and New San Jacinto," but out of the whole tract including those. For the purpose of construing the grant, the petition and all the papers in the *expediente* must be considered together. Looking at the petition, we find it stated that the "San Jacinto" referred to is described as lying between the *ranchos* named, and as actually shown on the "*general*" *desino* referred to; and it is expressly stated to be shown "in its *total extension* to be coterminous with the *ranchos* of Jurupa and San Bernardino towards the north, Temecula on the south, Huapa on the west, and San Gorgonio on the east." That is to say, it is expressly declared that the lands out of which the grant is to be made takes up all the space between those *ranchos*, and the sub-prefect's report states it to be "coterminous" with the lands expressed in the petition and shown by the copy of the *desino*." The grant refers expressly to the petition and the sub-prefect's report, and then grants the land "as shown in the *general desino*." The *desino* is in all these documents designated as the "*general desino*," showing that it was only intended to indicate in a "*general*" way the location and extent of the lands out of which the grants were to be satisfied, and the general proximate location within that tract of the lands already granted, and was not intended to locate it with mathematical accuracy.

Upon looking at the *desino* it is plain to the eye that the boundary of this tract and of the surrounding *ranchos* was intended to be coincident or "coterminous," as is expressly declared in the petition and report. Now, if the boundaries were intended to be coincident, or the tract known as San Jacinto was intended to be "coterminous" with the surrounding *ranchos* mentioned, then the *sobrante rancho* is clearly located, and properly located, upon lands within the exterior boundaries of the grant. But it is claimed on the part of the United States that by taking the dotted line drawn around the old and new San Jacinto *ranchos* and applying the scale at the bottom of the *desino*, and running by courses and distances, although no courses and distances are stated in the *desino*, as indicated by the rough sketch in accordance with the scale, the lands included would not extend to the boundaries of the surrounding *ranchos* indicated, and that that line so as-

certained must be taken as the limit of the lands out of which these three *ranchos* must be satisfied; and that this dotted line thus located on the ground must govern, notwithstanding the express statement in the *expediente* that these boundaries are to be "coterminous," and notwithstanding the fact that they are shown on the "*general desino*" to be "coterminous." By this construction and mode of location, the *sobrante* grant is located outside the dotted lines and of the exterior bounds of the grant.

The surveyor general adopted the view that the exterior boundaries of the grant were "coterminous" with the surrounding grants, and located the *sobrante* grant on that theory, within those boundaries. Under the practice, the grantee was entitled to select the location in a compact form anywhere within the exterior boundaries where it would not conflict with any prior grant, and in this case there is no other valid or confirmed prior grant with which the location conflicts. Although, under the decisions of the supreme court of the United States cited, we are not called upon to determine this question, we are by no means satisfied that the surveyor general was not entirely correct in the view he took of the case. That is the view which would naturally and at first sight strike an ordinarily intelligent person, familiar with these Mexican grants, upon reading the *expediente* and decree of the court, and comparing them by the eye with the *desino*. Even a considerable portion, perhaps one-half, of the *old San Jacinto rancho*, as now in fact patented, is located outside the dotted lines on the *desino* drawn, as is claimed it should be, by complainants. But if the location in accordance with the view of the surveyor general be erroneous, the error certainly is not so obvious or palpable as to create a presumption of fraud or of a willfully unauthorized location, and however erroneous, in the absence of actual conspiracy or fraud on the part of the officials taking part in the location and approval, it is conclusive in this case. They were the officers or tribunals appointed by law to determine the location, and that determination, under the decisions already cited, is final and conclusive. The location was contested step by step till the issue of the patent, as will be seen by the communication of the commissioner of the general land-office addressed to the secretary of the interior, a copy of which is annexed to and made part of the answer. The survey was ordered by Surveyor General Beale on April 1, 1864, but in consequence of exceptions and appeals it was not finally completed and approved till December 10, 1866, after Mr. Upson succeeded to the office of surveyor general. In August, 1866, Abel Stearns filed in the surveyor general's office objections to the survey, and in his affidavit he sets up the same charges as to the interest of Hancock and Conway, and their unlawful and alleged fraudulent connection with the survey, as are now alleged in this bill as constituting the fraud and conspiracy upon which the patent should be set aside, and the questions arising upon these charges were necessarily examined and decided by the surveyor general.

Both the correctness of the location and the alleged frauds were again fully considered by the commissioner of the general land-office; other evidence as to the alleged frauds having been produced before him. Able counsel of the opposing parties were heard, and the location was fully confirmed by him, as appears by his letter to the secretary of the interior of May 22, 1867, a copy of which is annexed to and made a part of the answer. In this letter the commissioner gives a full history of the case, and of his action on it, and especially calls the attention of the secretary of the interior to the charges of fraud which are now set out in this bill, and to the documentary evidence on the subject, and requests the direction of the secretary of the interior as to what further proceedings should be had, and as to the issue of the patent. After holding the matter under advisement from May 22 till October 29, 1867, Secretary Browning rendered his final decision, affirming the location of the grant, and ordering the patent to issue, as appears from the letter of the secretary of the interior to the commissioner of the general land-office of October 19, 1867, a copy of which is also annexed to and made a part of the answer. Thus it appears that not only was the proper location of the grant fully considered by all departments of the government having jurisdiction, but these very frauds, now set up as grounds for vacating the patent, were fully considered and determined; and, if fraud there was, in fact, it is a fraud that was fully investigated in the proceeding, and adjudged, and it will not now authorize the canceling of the patent. It is true that in this bill the surveyor general and commissioner of the general land-office, as well as all their subordinates, are charged by the attorney general with participating in the fraud; but there is no sufficient evidence to support the charge. It is not at all probable that either of those officers, had they been guilty, would have considered and heard and decided these very questions with respect to their associates in crime, and then have especially called the attention of the secretary of the interior to the frauds, and invoked his re-examination of the charges made. Neither the secretary of the interior, who investigated and passed upon the charges of fraud, nor the president of the United States, who executed the patent, is charged with being a party to the frauds. The secretary, at least, was not deceived, for his attention was especially called to the subject by the commissioner himself, although one of the parties *now* charged, and the secretary thereupon examined and decided the whole matter.

We might well stop here, but there is another ground upon which the bill must be dismissed. To fully present this point will require a somewhat extended history of the proceedings in the case of this grant, and the presentation of the matter in a connected form will involve some repetition of matters already stated. It would, in our judgment, be inequitable at this late day, considering all the circumstances of this case, to vacate the patent, even if there had been some evidence of conspiracy and fraud on the part of the officers charged. "When

the United States enters a court as a litigant it waives its exemption from legal proceedings and stands upon the same footing with private individuals, and therefore if, on a consideration of all the circumstances of a given case, it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity though the United States be the suitor." *U. S. v. Flint*, 4 Sawy. 43. Said Mr. Justice FIELD, in the case cited: "Although on grounds of wise public policy no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them, if different from the finding made; the changed condition of the parties and of the property from lapse of time; the difficulty from this cause of meeting objections which might perhaps at the time have been readily explained; and the acquisition of interest by third parties upon faith of the decree,—are elements which will always be considered by the court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him." *Id.* 58. If it can be inequitable to grant relief to the United States in any case, in view of all the surrounding circumstances, coupled with a great lapse of time, then this case affords a striking instance of that kind. Several of the leading parties charged, including the commissioner of the land-office and surveyor general, are now dead, or, for other reasons equally potential, their testimony cannot be had.

The petition for confirmation of the grant in question was filed, under the provisions of the act of 1851, to "*settle private land claims in the state of California*," on March 3, 1852. The claim was vigorously litigated in all the tribunals, original and appellate, having jurisdiction, and finally confirmed by the supreme court of the United States in 1864. *U. S. v. D'Aguirre*, 1 Wall. 311. On April 1, 1864, immediately after final confirmation, Surveyor General Beale issued instructions to Deputy Surveyor Thompson to make the survey; and he made the location. Exceptions were taken to it by parties interested in other claims of one kind and another, and this survey was returned by the commissioner of the general land-office at Washington to the surveyor general of California for further action; and it was afterwards finally located under the instructions of Surveyor General Upson, who in the intervening time had succeeded Beale; but the general location made under Beale's instructions was adopted with modifications to meet the demands of opposing claimants, exceptions having been taken to the location made. Before adopting or approving it, Surveyor General Upson required Mr. Hopkins, the keeper of the Spanish archives,—who is, doubtless, better informed on the subject of Spanish grants in California, and their *expedientes* and *desinos*, than any other man living, and whose aid has probably been called in at some stage of the proceeding in the case of every

grant presented for confirmation,—to examine the archives, the records of the land commissioners, and of the surveying department, and report the extent of the exterior boundaries of "San Jacinto" within which the grant could be located; and the propriety of the location to which exception had been taken. Mr. Hopkins made a thorough examination, and on September 18, 1866, made a very elaborate and lucid report, in which he expressed the opinion that upon an examination of the "original papers in the three San Jacinto cases, the *desinos* found in the Pedrorena case, and explained by the affidavit of Gasper O'Farrell, and the opinion of the supreme court," among others the following points were settled: "(1) That the exterior limits of the old Mission Rancho San Jacinto are the *ranchos* of San Bernardino and Jurupa, or Huapa, on the north; the Temecula on the south and south-west; the San Gorgonio on the east; the Guapa, or Huapa, on the north-west;" that the third grant, as to right of location, was the grant in question; and as the old and new San Jacinto claimants had selected and indicated their locations within the grant, and stipulated as to their western boundaries, that the *sobrante* claimants had a right to survey their 11 leagues in a compact form within the said exterior limits. Surveyor General Upson, after making sundry corrections on the exceptions of the predecessors of the promoters and managers of this suit, then represented by the leading counsel now managing this case for the ostensible complainants, but in the same and similar interests as before, and who was also the counsel in *Manning v. San Jacinto Tin Co.* 7 Sawy. 418, S. C. 9 FED. REP. 726, adopted the views of Mr. Hopkins, and finally approved the location as since patented.

This survey was again attacked before the commissioner of the general land-office, with great vehemence, as being improperly and fraudulently located outside of the bounds of the grant; the same grounds of fraud, the alleged false location, and the interest and connection of Conway with it,—the central point of fraud around which the minor acts set up are grouped,—having been alleged, and relied on to defeat the location. These questions were thoroughly argued before the commissioner, by able counsel, and after full consideration the location was confirmed. The commissioner, as we have seen, then referred the questions, with the record, exceptions, charges, and evidence of fraud, and briefs of counsel, to Mr. Browning, secretary of the interior, who, after long and mature consideration,—he having held the matter under advisement for over five months,—affirmed the decision of the commissioner, and directed the patent to issue; and it was, accordingly, issued October 26, 1867. Thus, after a protracted, tedious, and expensive litigation of nearly 16 years, between the United States and claimants of the land,—the last three and a half of which having been occupied in locating, and in contests over the location of the grant,—the patent was issued. The jurisdiction of all the appropriate tribunals having been exhausted,

the title was, at last, supposed to be "settled." The government appears to have been aided, in its endeavors to detect frauds and make the proper location, by the Argus eyes of all parties, desiring to take a part in the proceedings, making, or ever after hoping to make, under any pretense, adverse claims. Surely, under the circumstances, the location ought to be deemed correct, and it ought not to be disturbed except for the most cogent reasons.

On September 8, 1880, nearly 13 years after the issue of the patent, J. F. Manning, claiming interests as successor of Abel Stearns, being the same interests now represented by Baker, the prosecutor of this suit, with whom he (Manning) now appears, by the evidence, to be acting in concert, commenced in this court the suit of *Manning v. San Jacinto Tin Co.* 7 Sawy. 419; S. C. 9 FED. REP. 726, to declare a trust and control the legal title, under the patent, for his own benefit. The suit rested on the same grounds of false and fraudulent location as now set up in the name of the United States. The equitable opposing title of the complainant relied on, was the location of a large number of tin mines, under the customs of miners, made between 1866 and the date of the patent, long after the final confirmation of the grant in question, and during the progress of the contest over the location, and while the lands on which they were located were still *sub judice*, and at a time when there was no law by which any rights could be acquired in lands so situated. They were not then public lands, as held in *Newhall v. Sanger*, 92 U. S. 761.

On January 3, 1882, the bill was dismissed for want of equity, and on the several grounds that the complaint did not have a proper *status* to maintain the suit; that the facts did not show a case of fraud that was open to investigation, or other substantial equity, and that the equity, if any, was stale, for the reason, among others, that the statute of limitations applicable to private litigants had run nearly four times against the claim. That suit having failed, this suit was instituted in the name of the United States on April 3, 1883, nearly 16 years after the issue of the patent, when the litigation was supposed to be closed between the original parties to it, and more than 31 years after the litigation between the United States and defendant, and its grantors commenced by filing a petition for confirmation. Although the suit is brought in the name of the United States, it is as clearly, to all intents and purposes, a private suit of the parties instigating, prosecuting, and actually controlling it, as if brought in their own names. The attorney general, as a condition of assent to the use of the name of the United States, required a bond from Baker to indemnify the United States against any costs that they might be called upon to pay; and the consent, manifestly, would not have been given without this indemnity.

It appears from the letter of the commissioner of the general land-office to Secretary Teller, of March 2, 1883, that on the application
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of R. S. Baker, who also seems to have furnished the draught of this bill, permission to bring the suit was recommended and given, in the language of the commissioner, "on the alleged ground of fraud in the survey of the land described in said patent; *said application being accompanied by the draught of a bill of complaint stating more fully the alleged grounds of action in the premises.*" After going briefly over the history of the grant, and the proceedings to confirm it, the commissioner concludes: "It will be seen, by the *corrected* diagrams referred to, that the Rancho El Sobrante de San Jacinto, as patented, as stated in the application referred to, is located entirely outside of the San Jacinto tract; but *nothing appears in the record of the case to verify the allegations of fraud contained in said application, nor aside from the grossly erroneous location 'to corroborate them.'*" Notwithstanding this direct, positive statement of a want of evidence in the record to "verify" the charges of fraud made in the "application" and draught of the bill, or aside from what he is constrained to term, in opposition to solemn contrary decisions of his predecessors in office, who alone had jurisdiction to *finally determine* the question as to this particular grant, and did judicially determine it 16 years before, nothing but "the grossly erroneous location to corroborate them," he adds: "In consideration, however, of said allegations, and of the remarkable location of the tract in question, I respectfully recommend that *authority to bring suit* in the name of the United States for the purpose stated, be granted, *with such conditions as to the payment of costs and expenses as may be properly imposed.*"

The draught of the bill, application, and other papers were returned, and in accordance with this recommendation authority to use the name of the United States was given, upon giving a bond to indemnify the government against costs. The indemnifying bond having been furnished and filed in the case, the suit was instituted. The bill is signed by the attorney general as solicitor, and by the United States attorney for the district of California as counsel, manifestly, in form, to comply with the ruling of the supreme court on this point in *U. S. v. Throckmorton*, 98 U. S. 70. Since the filing of the bill, however, the whole proceedings have been conducted in the case, so far as we have observed, by the able counsel of the parties making the application for leave, and indemnifying the government,—the leading counsel being the same who was counsel for Abel Stearns in contesting the location of the grant 16 years and more ago, and who also was the counsel of record of complainant, and who in fact conducted and argued the case of *Manning v. San Jacinto Tin Co.* in this court, *supra*. Since the filing of the bill in this suit, we have seen no indication in any form of the guiding hand or supervising authority of the attorney general, or of the United States government. So far as our observation extends, neither has taken any part in conducting the case. Thus it appears that leave has been given to private parties, upon indemnifying the government, to prosecute a suit,

which they could not maintain in their own names, in the name of the United States, to vacate a patent issued to a party in pursuance of a final decision and location of a Mexican grant, in a proceeding between the same parties or their privies, at the end of 16 years' litigation, and nearly 16 years after the date of the patent, on the ground that the patent was fraudulently located, when, confessedly, there was no evidence of the alleged frauds presented to the officers of the government, except what appeared to the commissioner of the land-office to be a "grossly erroneous location" of the grant; whereas his predecessors, having the final jurisdiction over the matter, had fully examined the location, considered all objections of fraud, heard elaborate arguments upon them, and judicially determined the grant to be properly located.

The commissioner bases his opinion as to the "grossly erroneous location" of the grant upon a private survey, which he calls the "corrected diagram" of O'Farrell, *ex parte as to this grant*, at least, made in 1869,—two years subsequently to the issue of the patent in question,—in which he attempts to locate the exterior bounds of the San Jacinto tract with special reference to the dotted lines on the *desino* prepared by him a quarter of a century before, but without reference to the location of the boundaries of the surrounding *ranchos*, which are represented in the *desino*, and expressly described in the various documents constituting the *expediente* as being "coterminous" with the "tract called 'San Jacinto.' " This survey had been platted upon the maps of the public survey in the land-office and it is referred to as being, *at that time*, recognized "by this office, and the department as giving the out-boundaries of the tract of San Jacinto." However proper it may have been to make this recognition at that time with reference to grants within these out-boundaries still unlocated, and over which he then had jurisdiction, this recognition, it seems to us, should not affect rights vested in grants already regularly located by former commissioners and secretaries of the interior, who recognized different exterior boundaries, based upon a different construction of the *desino* and *expediente*, and diagrams then existing, but afterwards "corrected" for the purposes of other grants yet to be located. Rights of parties, once settled, should not be disturbed for light causes, depending upon varying opinions arising from a change of incumbents of the office having jurisdiction of the same *general* subject-matter, and especially where those changes of incumbents are frequent. The next commissioner and secretary of the interior may reject this O'Farrell survey and "corrected" diagram as "grossly erroneous," and adopt the original decision of Commissioner Wilson and Secretary Brown upon the point at issue.

O'Farrell himself, who made the *desino* in 1845, manifestly did not, in 1866, regard the dotted lines as the limit of the exterior boundaries of the "tract called 'San Jacinto,' " within which all these grants were to be located, as clearly appears from his affidavit made

in that year before the issue of the *sobrante* patent in question. He says that "he is the person who made the surveys of a *part of the tract of country called 'San Jacinto,'* [not the tract called 'Old and New San Jacinto'] shown on the hereto annexed diagram or map," (Exhibit A,) *including the specific tracts* called "San Jacinto Viejo" and "San Jacinto Nuevo,"—"a part," *not the whole*, of the "tract called 'San Jacinto;'" the annexed "diagram or map *including the specific tracts* called" "Old and New Jacinto," not the whole or general "tract called 'San Jacinto.'" "That the dotted line shown on the diagram represent the boundaries (being the *part of the hills and mountains adjoining*) of the *said respective tracts;*" that is to say, the said two *specific tracts*. "That the said lands,"—that is, the two tracts, Old and New San Jacinto,—"*were within the tract known and called at the time, 'San Jacinto,'*"—that is, within the exterior larger boundaries of that tract. "That said '*tract of San Jacinto*'" [in the singular number, referring to the larger tract, within which are Old and New San Jacinto, the two specific tracts mentioned] "*extended, as shown on said diagram or map, to the lands then known as San Bernardino, and Hurupa, Huapa, Temecula, and San Gorgonio.* The distance to the boundaries of said tract from the boundaries [said dotted lines, as shown on the diagram] of the *aforesaid grants*"—not of the tract within which they are located, but said grants—"of San Jacinto Viejo and San Jacinto Nuevo was not ascertained by deponent at the time he made the survey of *said grants,*"—not of the exterior limits within which the said two grants were located, but the limits of the specific location, within the exterior boundary. Thus O'Farrell, throughout the entire affidavit, clearly and sharply makes and keeps up the distinction between the "tract called 'San Jacinto,'" within the exterior limits of which the two specific tracts of Old and New San Jacinto, as well as the *sobrante* grant, were to be located, and the boundaries of the two tracts, granted out of the larger tract, which he sought to locate within the larger tract; and he only attempts to locate proximately the amounts of land called for in those two grants within the larger tract called "San Jacinto," in which all are to be located. At the time O'Farrell made the *desino*, the *sobrante* grant had not been made or thought of, and, of course, the *desino* was not made with any reference whatever to that grant. He makes it as plain as he can make it, in this affidavit, that the *dotted lines* are only intended to show the limits of those two tracts, and not the limits of the "tract called 'San Jacinto,'" which was to extend to the boundaries of the surrounding *ranchos*, wherever they might be; their distance from the line of his location not having been ascertained.

It is manifest that this is but a contest between private parties, for some supposed benefit of such parties, carried on at their own expense and managed by their own counsel, solely in their own individual interests, for the accomplishment of their own ends; and the parties maintaining the suit are not alleged in the bill to have any inter-

est in the litigation. In the former suit of *Manning v. San Jacinto Tin Co.* 7 Sawy. 419, S. C. 9 FED. REP. 726, the complainant's alleged interest was only in tin mines, alleged to have been located while the land was *sub judice*,—at a time when no private rights could, under the laws in force, be acquired in them.

Upon bald allegations of fraud in the application for leave to use the name of the United States, and in the draught of the bill submitted, not verified by oath or evidence produced, one citizen of the United States is allowed to harass others with litigation that ought to have been long since closed in fact, as it was supposed to be in law. If the United States have any real interest, it would seem that it ought to be litigated at the expense of the government itself, and upon the responsibility of its own officers. What makes the hardship greater, is, the litigation must be carried on mainly at the expense of the defendant thus harassed, even if it fully succeeds in its defense. The indemnity of the United States against costs only covers the fees of the several officers, advanced by the government, such as clerk's and marshal's fees, which the United States would be called upon to pay to these officers; for, whatever the result of the suit, the defendant cannot recover its own costs and disbursements, which must amount to several thousand dollars, besides counsel fees, against the nominal complainant, for the United States never pays costs to the opposing party. The defendant's costs and disbursements cannot be recovered from the instigators and managers of the suit, for whose sole benefit it is prosecuted, for they are not parties to the record. The costs against which the United States are indemnified, constitute but an insignificant item of the entire expense of the litigation. Thus, except as to the actual costs that must be advanced, the real complainants can harass the defendants with a long and costly litigation at the expense of the defendants thus permitted to be sued, whatever the result of the litigation. The parties do not litigate in such cases upon equal terms.

So far as lapse of time is concerned, as an element of equity, or want of equity, we think the case should be treated as though it were brought by the parties who instigated the suit, and who are paying the expenses and managing it for their own purposes. The statute of limitations of the state bars a suit, founded on fraud, in three years. This time had run five times over, after the frauds are alleged to have been perpetrated, before this suit was instituted, and every fact alleged, supported by evidence, as an element of fraud, existing at the date of the patent, was of record, and as well known then to the government, and to the leading counsel in this case, as it is now. The principal fact asserted, of "grossly erroneous location," was as palpable upon the record then, and as well known, as now. The fact that Conway owned the grant, and was chief clerk in the surveyor general's office, at the time of the location, was as notorious and well known at that time as now. These, and the alle-

gation that Conway managed the location, were the great central facts which formed the basis of all other charges. The charges, as we have seen, were called to the attention of the commissioner of the land-office, and of the secretary of the interior, and repudiated. The charge that Conway had anything to do with the location of the grant, and all other charges inconsistent with the integrity of the parties charged, are distinctly denied in the answer, and not only unsupported by evidence, but disproved by the witnesses examined. There is no other fact, of a fraudulent character, supported by the evidence, that was not, at the time, brought to the notice of the government, considered by the proper officers and tribunals, and decided. The element of staleness is, therefore, fully shown.

Again, when the United States come into a court of equity asking equity, they must, like a private party, do, or offer to do, equity. They cannot do equity in the present case, as it now stands. It is not disputed that the grant is a valid grant, and that the patentee and those holding under her are entitled to the land confirmed, somewhere within the exterior bounds of the grant. The proceedings for confirming and locating land grants under the act of 1851, and amendatory acts, were special; the jurisdiction being special, and not general. Outside the modes prescribed by the act there was no jurisdiction in the courts of the country. When a case had gone through the prescribed course to a patent, the jurisdiction was exhausted, and the officers became *functi officio*. Should this patent be annulled for fraud, in the exercise of the general equity jurisdiction of the court, neither it, nor any other tribunal or officer, has authority to, correctly or otherwise, relocate the grant, and the grant would fail. *U. S. v. Throckmorton*, 4 Sawy. 42. "The circuit court of the United States has now no original jurisdiction to reform surveys made by the land department of confirmed and patented Mexican grants in California." S. C. on appeal, 98 U. S. 61. Besides, on the issue of the patent, on October 27, 1867, the land within the exterior limits of the grant ceased to be *sub judice* as to this grant, and subject to such other disposition as the government should see fit to make of it. In this case, the evidence indicates that, subsequently to the issue of the patent, a railroad grant under acts of congress is claimed to have attached to the odd sections not covered by patents, and that other grants have been made of the even sections; so that there is no land, or at least but little, if any, left to satisfy this grant within the restricted limits insisted on by the complainants; and the grant would, also, be lost on that ground. Manifestly, the parties could in no respect be placed *in statu quo*. The United States are no losers, in fact. If the lands were erroneously located, the lands upon which the location should have been made remained in their stead, and they seem to have been disposed of by the government. The grant could be satisfied but once.

The corporation defendant was organized, and the title of the land

conveyed to it, in January, 1868, more than 15 years before the commencement of this suit. The testimony shows numerous stockholders,—the stock having changed hands to a greater or less extent from time to time,—most of whom are not charged with participating in the alleged frauds, and as to whom there is no evidence whatever showing notice, except so far as notice to the parties originally creating the corporation affects them. Are the interests of such stockholders to be jeopardized by reason of frauds practiced years ago by the original incorporators, prior to the existence of the corporation, admitting that there were such frauds? Is there no time during the life of a corporation—in this state 50 years—within which a stranger can purchase stock in a corporation without risking the loss of his investment, at the suit of the United States, on account of frauds perpetrated by those organizing the corporation prior to its creation? After a great lapse of time, strangers purchasing stock in a corporation, without actual notice of frauds committed before the creation of the corporation, and to which the corporation, as such, was no party, affecting the title to lands held by the corporation, ought to be entitled to rely on the decrees of the United States tribunals affirming such titles.

Those familiar with the notorious public history of land titles in this state need not be told that our people coming from the states east of the Rocky mountains very generally denied the validity of Spanish grants, and their proper limits or location, and, determining the rights of the holders for themselves, selected tracts of land wherever it suited their purpose, without regard to the claims and actual occupation of holders under Mexican grants, with a view of acquiring pre-emption rights, and title under the United States, at some subsequent period. Many of the older, best-authenticated, and most-desirable grants in the state were thus, more or less, covered by trespassing settlers. When the claims of Mexican grantees came to be presented for confirmation, these settlers aided the United States; the most formidable opposition usually coming from them, first, to the confirmation of the grants, on every imaginable ground, of which the most frequent was fraud in some form at some stage of the proceedings. When confirmed, and the officers of the government came to the location, the contest became still more vigorous and acrimonious; the trespassing settlers, or adverse claimants under other grants, seeking to have the confirmed grant located so as not to interfere with their claims or interests. One body of settlers or claimants would seek to move the location in one direction, and another, for similar reasons, in another. Thus the opposition to confirmation and location, from trespassers and contesting claimants, was more violent than the contest between the government and the petitioners for confirmation. Charges of fraud are easily made, and they were by no means sparingly made by incensed defeated parties, and these reckless charges by disappointed trespassing and opposing claimants, in

many instances, as in this case, involved the officers of the government, as well as the claimants under the grant.

These were the matters most embarrassing to the tribunals and officers appointed to adjudge them. It is not improbable that more or less frauds were committed in some of the many grants confirmed. But, if so, it is far more conducive to the public interest and public peace, as well as to private interests, that they should at this late day pass unpunished, than that this kind of acrimonious litigation should be indefinitely prolonged.

The United States compelled the Mexican grantees, willing or unwilling, to present their titles for adjudication, or, as an alternative, forfeit their lands; and for this purpose provided their own special tribunals to "settle" all questions of title and location. There were three opportunities for hearing, and at one time four, as to the confirmation: first, before the board of land commissioners, the tribunal of original jurisdiction; then successive appeals to the district, circuit, and supreme courts of the United States; in all of which, except the last, the parties were entitled to introduce further evidence. There were three hearings, also, in this case, as there usually were in others on the location: before the surveyor general, the commissioner of the general land-office, and the secretary of the interior. Surely a sufficient opportunity was afforded the government, with so much aid from vigilant adverse claimants, to discover and bring to light any weakness in the title, or any error or fraud in the location. If these tribunals have not been able, after so long, patient, and exhaustive a course of litigation, to properly settle the points in controversy, then there is little hope now, by a new course of litigation in the courts of ordinary jurisdiction, of reaching a correct result.

In view of all the circumstances surrounding this case, in connection with the long time that has elapsed since the issue of the patent, we think the equity, if any there be, stale, and that it would be to the last degree inequitable to annul the patent in question, or reopen the controversy as to the proper location of the grant. There should be some time, in the life-time of a generation, when land titles derived from Mexico through the United States should become "settled,"—some time when the United States should themselves cease to litigate, or allow private parties in their name to litigate, with their grantees the titles to lands derived through them from the Mexican government, and confirmed and finally located by the government itself. The interests of litigants themselves, of the state of California, of the United States at large, and the interests of public justice, and the public peace, require that an end be put to this kind of litigation.

In closing, we venture a single observation upon the practice which, unfortunately, as we think, to some extent prevails, of allowing private parties to litigate their claims, of the character in question, in the name of the United States. The United States either have a paramount interest in the lands adversely claimed by private parties,

which justifies them in suing such parties to enforce their rights, or they are legally or equitably bound to some third party, lawfully deriving title under the United States, to maintain the title in the courts for the benefit of such parties; or else they have no such interest as to justify litigation, or are not legally or equitably bound to litigate the title for the benefit of such other parties. It seems to us, therefore, that if the United States have such title or interests as justifies litigation, or if they are legally or equitably bound to maintain the title for the benefit of parties deriving title under them, then the United States ought to pay the expenses, and take the control and responsibility of the suits, and not require an indemnity for costs from private parties, and turn the litigation over to them. If, on the other hand, they have no such interest in the subject-matter of litigation, and are under no obligation to protect parties deriving title under them, then the United States ought not, upon indemnity against costs, or otherwise, to allow the use of their name, thereby lending dignity to the suit, to one set of private parties, who, in consequence of lapse of time, want of equity, or for other reasons, have no rights upon which a suit can be maintained in their own names to harass with protracted, tedious, and expensive litigation, another class of citizens claiming title under the same government. And the fact of requiring indemnity for costs, and of turning over the whole matter of litigation to the indemnifying parties, seems to us to be a strong indication that the government has grave doubts as to its having an interest in the controversy, or of its being under any obligation to litigate for the benefit of others, sufficient to justify their taking control or paying the costs of the litigation. In view of the long struggle to "settle" private land titles under Mexican grants in California, and in the interest of the stability of land titles and of the public peace, it is to be earnestly hoped that in future this privilege of using the name of the United States for the accomplishment of private ends will be more sparingly granted, and only granted upon the most urgent occasion, if such occasion there can be. It appears to us that leave to use the name of the government for purposes of litigation should not be granted upon the representation of private parties, confessedly not verified or supported by any substantial evidence produced by them.

The bill must be dismissed; and it is so ordered. We regret our inability to impose costs upon the real prosecutors of this suit.

Laches as defense in suits by United States. See *U. S. v. Southern Colorado Coal & Town Co.* 18 FED. REP. 273, and *U. S. v. Beebe*, 17 FED. REP. 36.

Suits against state and state officers. See *Parsons v. Marye*, ante, 113, and *Baltimore & O. R. Co. v. Allen*, 17 FED. REP. 171, and note, 188-197.—[ED.]

THE LYDIAN MONARCH.

(District Court, D. New Jersey. March 21, 1885.)

1. CARRIERS OF GOODS BY WATER—BILL OF LADING—EXCEPTIONS—PERILS OF THE SEA—DAMAGE TO CARGO—BURDEN OF PROOF.

Where a bill of lading, containing an exemption from liability for damages caused by perils of the sea, acknowledges the receipt of goods "in good order and condition," and such goods are damaged by sea water, it is incumbent on the carrier to prove that the loss was occasioned by perils of the sea. Evidence held insufficient to show that the damage was caused by perils of the sea.

2. SAME—LIMITATION OF LIABILITY—INVOICE VALUE.

A provision in a bill of lading that "the ship-owner is not to be liable for any damage to the goods * * * in any case for more than the invoice or declared value of the goods, whichever shall be the least," is reasonable, and will be enforced in case of damage to the goods; following *Hart v. Pennsylvania R. Co.* 7 FED. REP. 630; S. C. 5 Sup. Ct. Rep. 151; and *The Hadji*, 18 FED. REP. 459.

Libel *in rem*.

See & Bro., for libelant.

Butler, Stillman & Hubbard, for respondent.

NIXON, J. The libel was filed in the case to recover damages for injury to merchandise, to-wit, 21 bales or packages of burlaps, on the voyage of the steam-ship Lydian Monarch from Dundee, in Scotland, to the port of New York, the libel alleging that the master, officers, and crew of said steamer so negligently and carelessly conducted themselves that one or more of the side-ports were insufficiently or insecurely fastened, by means whereof sea water ran into the said vessel and upon the cargo, and greatly damaged the goods aforesaid. The shippers were James Duncan & Co., of Dundee, and the bill of lading acknowledges that the said packages were received on board in good order and well conditioned, and that they were to be delivered to the libelant in New York in like good order and well conditioned, subject, nevertheless, to a large number of exceptions and restrictions, which it is not pertinent to the case to fully enumerate. Among these limitations to the liability of the ship-owners were the following: They were not to be liable (1) for any damage which arose from perils of the seas; nor (2) in any case for more than the invoice or declared value of the goods.

The steamer sailed from London on March 30, 1884, and arrived at her port in New York, (Jersey City,) on the fourteenth of April following. The consignees paid the freight and duties before the merchandise was delivered to him. When delivered from the ship, he discovered that twenty-six or seven of the bales were more or less damaged by sea water. He sent at once for an insurance appraiser, Mr. Cleveland, who examined the goods, and reported, as an expert, that 21 bales were badly damaged, and that the best disposition for all concerned was to sell the same at public sale, giving interested parties notice of the sale. Acting on this advice, he sent the 21 bales to the auctioneers Field, Chapman & Fenner, and gave notice to the

recognized agents of the steam-ship company, Patton, Vickers & Co., of the time and place of sale, and that the steamer would be held for all loss sustained. The sale was made, and the net proceeds realized were \$3,110.87, from which sum the libelant claims should be deducted \$43.25, the amount of the damages to the other bales not sold, and the further sum of \$20 paid to the appraiser for his certificate of loss. He then proves the value of burlaps in good condition, in the New York market, on that day; claims that the bales sold were worth \$3,771.47, and demands of the respondent the difference between these sums as the measure of his loss.

Two questions are thus presented: (1) Was the injury to merchandise caused by perils of the sea, for which the vessel is not responsible? (2) If not, has the libelant, under a proper construction of the bill of lading, sustained any damage for which the respondent is liable?

1. The bill of lading acknowledging that the burlaps was delivered to the steamer in good order and condition, and the proofs showing that it was damaged by sea water, it is incumbent on the respondent to prove that the loss was occasioned by perils of the sea. Failing in this, the company is liable for the damage sustained. *Hooper v. Rathbone*, Taney, 519. It seems to be acknowledged that the damage was caused by sea water leaking into the compartment where the goods were stowed through cargo port No. 4. The steamer has eight of these ports, four on each side, less than two feet square in size, through which the cargo is loaded until the lower side of the port is brought down to the water-line; they are then closed with an iron door on hinges, and secured with two cross-bars and four nutted bolts. The joints are made water-tight by the use of a mixture of white and red lead. This is necessary, as the ports are partly under water when the vessel is loaded.

The theory of the libelant is that cargo port No. 4 was negligently closed and fastened by the carpenter, whose duty it was to see that they were all made secure and water-tight before sailing. The respondent, on the other hand, assumes that it was properly fastened, but that the screws worked "slack" during the voyage on account of the rough weather which the steamer encountered. It is somewhat significant that, although the carpenter was on the stand as a witness, he was asked nothing about closing this particular port; and the only proof we have on the subject is the ordinary presumption that when one is charged with a duty he is supposed to properly perform it. It is also to be observed that, although it was the duty of the respondent to show that the leakage was caused by perils of the sea, we have no evidence of any storm, except general statements that the sea was rough at times, and the vessel labored heavily. I think the respondent has failed to show affirmatively that perils of the sea caused the damage.

2. The suit is based upon the claims of the libelant that the meas-

ure of damages which he is entitled to receive, is the difference between what was realized on the sale of the damaged goods, and their market value in New York at the time of the sale. It is conceded that this is the general mode of computing damages, in the absence of any agreement to the contrary. But these goods were shipped under a bill of lading which, in express terms, limited the shipper or consignee to a different and smaller rate of compensation in the case of loss. Its language is that "the ship-owner is not to be liable for any damage to the goods, * * * in any case, for more than the invoice or declared value of the goods, whichever shall be the least." Is such a limitation of liability on the part of the ship-owner one which the court ought to enforce? In analogy to the settled doctrine that a common carrier cannot relieve himself from the consequence of his own fraud by any stipulation in a bill of lading, the courts have been quite reluctant to give effect to any clause or contract which tends to lessen his liability, when the loss is occasioned by his own negligence, but it is now settled that they will recognize such limitations when they seem to be just and reasonable.

The question came before Judge McCrory in the case of *Hart v. Pennsylvania R. Co.* 7 FED. REP. 630, which was a suit to recover damages for the negligence of the defendant company in transporting the plaintiff's horses from Jersey City to St. Louis. One of the horses, valued at \$15,000, was killed, and others greatly injured. The shipper took from the defendant a bill of lading, containing amongst other things the printed condition: "That the carrier assumed a liability on the stock to the extent of the following agreed valuation: If horses, * * * not exceeding \$200 each; if a chartered car, on the stock and contents in the same, not exceeding \$1,200 for the car-load." The horses were not shipped in a chartered car, and the question was whether the limitation of \$200 on each horse should be applied. The learned judge held that it was a just and reasonable limitation of the carrier's liability, and ought to be enforced, and directed the jury to assess the damages in a sum not exceeding \$200 on each horse killed or injured. The case was carried up by writ of error, and the supreme court has recently affirmed the judgment of the court below. See *Hart v. Pennsylvania R. Co.* 5 Sup. Ct. Rep. 151.

In *The Hadji*, 18 FED. REP. 459, Judge BROWN, of the Southern district of New York, considered a stipulation of a bill of lading in the exact words of the contract in the present case to be just and reasonable, and in a well-considered opinion found abundant authority for so doing.

A decree must be entered for the libellant, and a reference ordered to ascertain the damages. The amount due must be adjusted upon the above principle of computation, and if it should turn out that the libellant has received from the sale of the damaged goods the invoice price, after deducting the costs of importation, sale, etc., the libel will be dismissed.

PAQUETTE v. A CARGO OF LUMBER.

(District Court, S. D. New York. February 28, 1885.)

DEMURRAGE—VIS MAJOR—OBSTRUCTION BY FIRE DEPARTMENT—CUSTOM.

A canal-boat, laden with lumber, was sent to discharge at the wharf of S. & Co., who had bought the lumber of the shipper's agent. When she had been discharging there about two hours a fire broke out in S. & Co.'s lumber yard, adjoining, and two fire department boats, coming up along-side the canal-boat, laid hose across her, so as to prevent the further discharge of the cargo. This continued some four or five days, after which the residue of the cargo was discharged. The owner of the canal-boat libeled the lumber for demurrage. No bill of lading was put in evidence, but it was proved that, by the custom in the lumber trade, four or five lay days upon such cargoes were allowed, and that it was the duty of the captain of the boat to put the lumber on the wharf, the obligation of the receiver under the custom being only to furnish a proper berth and room on the dock to receive the lumber, so that it might be discharged within that period. Such berth, facilities, and room were furnished by S. & Co. *Held*, that the burden was upon the libellant to prove that some fault of S. & Co. caused the delay; that when it became necessary for the fire department to use the position where the canal-boat lay, it was the duty of S. & Co. to provide means to discharge elsewhere, and they would have been liable had it appeared that the subsequent delay was caused by their inability to do so. But the evidence showed that the firemen would not allow the boat to be moved, and that the libellant was unable to move her; *held*, that the obstruction caused by the fire department was in the nature of a superior force, for which S. & Co. were not responsible; and that the loss must remain where it fell.

In Admiralty.

Hyland & Zabriskie, for libellant.

Goodrich, Deady & Platt, for respondents.

BROWN, J. The libel in this case was filed to recover damages in the nature of demurrage for seven days' detention of the canal-boat Mary A. Bigelow, in the delivery of the lumber libeled, to G. L. Schuyler & Co., Forty-second street, East river. The lumber was brought from Canada, consigned to the shipper's agent here, and by him sold to Schuyler & Co. The boat arrived September 17, 1883, reported to the agent, and on that day was directed to Schuyler & Co.'s dock, where she arrived on the morning of the 18th. It was proved that, by the custom in the lumber trade, four or five lay days upon such cargoes were allowed, and that it was the duty of the captain of the boat to put the lumber upon the wharf; the obligation of the receiver, according to the custom, being only to furnish a proper berth and room on the dock to receive the lumber so that it might be discharged within four days after reporting arrival. A proper berth, facilities, and room for unloading were furnished by Schuyler & Co. on the 20th, and at 7 A. M. on the morning of that day the boat, having been hauled to her berth, commenced to discharge. Two days were sufficient time to discharge the lumber after commencing, and only that time was finally employed in the actual work of discharge. But about two hours after commencing the discharge a fire

broke out in the yard of Schuyler & Co., and two fire-boats belonging to the fire department came up to the wharf, made fast along the outside of the libelant's boat, and ran several lines of hose across his boat, so as to prevent any further discharge of the lumber. This continued some four or five days, after which the fire-boats moved away, and the residue of the lumber was discharged.

The liability for demurrage, or damages in the nature of demurrage, must rest either upon express contract, or neglect of some duty imposed by law or custom. Where, by the terms of the bill of lading, the consignee has bound himself to discharge the vessel within a certain time, he must bear all risks of interruption. In this case there was no bill of lading put in evidence; consequently, the only ground of liability is some neglect of duty by Schuyler & Co. Under the custom allowing them four or five lay days, they were only bound to furnish reasonable facilities for the captain to discharge, by providing him with a suitable berth and space in which to discharge the lumber within that time. When it became necessary for the fire department to make use of the position where the canal-boat was, I think it was the duty of Schuyler & Co., under this custom, to provide means to discharge elsewhere, as much as though the wharf at that place had tumbled down, or become unsafe through the elements, such as ice or storm, (*Bowen v. Decker*, 18 FED. REP. 751;) and any delay in furnishing such facilities would be at their risk, because covered by the four or five lay days allowed by the custom. Had it clearly appeared that that delay was solely in consequence of their inability to furnish any other berth, I should hold them liable for the interruption through the fire. But the evidence does not establish this. On the contrary, it indicates that the firemen would not allow the libelant's boat to be moved, because it would interrupt their work. The foreman testified that he endeavored to get the fire-boats to let the canal-boat out, so as to go to another place; but the firemen said it could not be done, and refused to allow the boat to be moved. The libelant had employed Schuyler & Co. to discharge the boat. He made no request of the firemen to be permitted to remove elsewhere.

The burden of proof is upon the libelant to show that some fault of the respondents caused the delay. *Fish v. One Hundred and Fifty Tons, etc.*, 20 FED. REP. 201. Whether Schuyler & Co. had any other available berth or not (which does not clearly appear on the evidence) is immaterial, if the libelant was in fact unable to move his boat so as to avail himself of it; and such is the weight of evidence. Schuyler & Co. are not responsible merely for the obstruction caused by the interference of the fire department. When that interruption arose, it was equally the duty of Schuyler & Co. to provide another berth, and the duty of the libelant to go to it at once. The risk of ability to provide another berth was on Schuyler & Co. The risk of being able to get away from the obstruction caused by the fire department, and to go to another berth, was upon the libelant. As the boat could not

get away on account of this obstruction, and as this obstruction did not arise through any fault of Schuyler & Co., the boat was not kept there by their fault; and hence the delay was not through their fault any more than if the libelant's boat had been sunk at the berth assigned, and he had been unable, in consequence, to put the lumber upon the wharf within the time provided by custom. The obstruction was in the nature of a superior force; and if the libelant could not extricate his boat, the loss must remain where it fell,—as much so as if the delay had arisen from the boat's sinking at her berth. *Fish v. One Hundred and Fifty Tons, etc.*, *supra*, and cases there cited; *Ford v. Cotesworth*, L. R. 4 Q. B. 127, 133; *Cunningham v. Dunn*, 3 C. P. Div. 443; *Postlethwaite v. Freeland*, L. R. 5 App. Cas. 599, 621.

Any delay arising from other causes is fully covered by the amount tendered and deposited in court. The libelant will be entitled to the amount deposited. The costs must be taxed to either party according to the date of the payment of the money into court.

THE SAUNDERS.

(Circuit Court, S. D. New York. March 24, 1885.)

ADMIRALTY PRACTICE—APPEAL—OFFER OF TESTIMONY WITHHELD BELOW.

An appellant will not be allowed to produce testimony upon appeal which he has deliberately withheld in the court below.

Motion to Suppress Depositions.

E. D. McCarthy, for libelant.

Thos. L. Ogden, for appellee.

Butler, Stillman & Hubbard, for the Saunders.

WALLACE, J. The appellee moves to suppress the depositions of witnesses taken in this court, by the appellant because, although the witnesses were present at the instance of the appellant at the hearing in the district court, they were not examined. It is insisted that a party should not be allowed to produce upon appeal testimony which he has deliberately withheld in the court below.

Although appellate courts in admiralty treat an appeal as a new trial, and exercise great liberality in permitting new proofs and new pleadings in furtherance of justice, they are not constrained by any arbitrary rules which require them to receive testimony which ought to have been produced but was not produced in the court of original jurisdiction. In the case of *The Maybey*, 10 Wall. 419, 13 Wall. 738, the supreme court refused to allow a commission to examine witnesses because no excuse was shown in the moving papers why the wit-

nesses were not examined in the courts below. See, also, *The Boston*, 1 Sumn. 331; *Coffin v. Jenkins*, 3 Story, 120; *Taylor v. Harwood*, 1 Taney, 438. In *Farrell v. Campbell*, 7 Blatchf. 158, NELSON, J., held that where the appellant declined to appear upon the hearing in the district court, upon the refusal of that court to postpone the hearing, he could not be permitted to contest the merits of the decree on appeal.

If parties are permitted to withhold evidence in the district court, take the chances of success without it, and then avail themselves of it by appeal in case of failure, the practice would tend to intolerable abuses. It would be unjust to the adverse party, because he might prefer to abandon his case if the testimony had been presented, rather than incur further expense and labor in litigating. It would be trifling with the court of original jurisdiction by invoking its decision upon an hypothetical case while withdrawing the real case from consideration. It would impose unnecessarily upon a court of appellate jurisdiction the duty which appropriately belongs to a court of original jurisdiction.

The authorities referred to justify the granting of the motion.

FRAZER LUBRICATOR CO. v. FRAZER and others, Partners, etc.¹*(Circuit Court, D. Minnesota. April, 1885.)***JURISDICTION OF CIRCUIT COURT—INFRINGEMENT OF TRADE-MARK—CITIZENSHIP.**

An Illinois corporation brought suit in the United States circuit court for the district of Minnesota against S. F. & Co., a firm composed of citizens of the state of Illinois, and their agents, Z. & H., who were citizens of the state of Minnesota, to restrain them from infringing its trade-mark in the state of Minnesota. *Held*, on motion to dismiss for want of jurisdiction on the ground that the substantial controversy was between citizens of Illinois, Z. & H. having by answer disclaimed the alleged agency and denied any interest in the suit, that the circuit court had jurisdiction.

Motion to Dismiss.

The bill of complaint is filed by a corporation, citizen of Illinois, against defendants to enjoin them from using a trade-mark belonging to the complainant, or an imitation of it calculated and intended to deceive the public, and advertising that they kept on hand and were the sole agents for the sale of such axle-grease indicated in trade-mark. The trade-mark used by complainant is "Frazer's Axle Grease," printed on a label, with devices and pictures of wagons with horses and drivers, and other representations of a peculiar character. The bill charges that the defendants Frazer & Co. manufacture a similar axle-grease, and attached a label marked "Superior Axle Grease, manufactured by Frazer & Co.," with devices so nearly alike that used by complainant as to deceive the public; and that it is used for the purpose of fraudulently deceiving and misleading persons who buy and use axle-grease. There is also an allegation that defendants Yanz & Howes are the agents of Frazer & Co., in St. Paul, Minnesota, for the sale of axle-grease manufactured by them, and so advertise themselves, and are selling the said axle-grease labeled with the devices substantially similar to the trade-mark exclusively owned by complainant. An injunction is prayed for, etc.

The defendants composing the firm of Frazer & Co. are citizens of Illinois. Yanz & Howes are citizens of Minnesota, and reside in the city of St. Paul. Service of subpoena is made on Yanz & Howes, and this firm alone appear and file an answer, denying that they are agents of Frazer & Co., and allege that they purchased the axle-grease received and for sale by them in the open market in the course of trade, and that they have no interest in the other matters charged in the complaint. Replication is filed.

The title of the complainant to the trade-mark and the manufacture of "Frazer's Axle Grease," as set forth in the bill, is derived from certain assignments of letters patent, and contracts between the complainant, its grantors, and S. Frazer, one of the defendants. A motion is made to dismiss bill for want of jurisdiction. The princi-

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

pal reason assigned for dismissal is that the substantial controversy in the bill is between citizens of Illinois, and the defendants Yanz & Howes have no interest in it, and have disclaimed alleged agency in their answer.

Horton & Morrison, for complainant.

John B. & W. H. Sanborn, for defendants.

NELSON, J. I suppose the complainant could have brought this suit against Yanz & Howes alone. The controversy between these parties, citizens of different states, is that defendants advertised that they had on hand for sale an article of axle-grease, with a trade-mark "Superior Axle Grease, manufactured by S. Frazer & Co.," with devices similar to the trade-mark of the complainant, and tending to deceive the public. The object of the suit is to enjoin Yanz & Howes from calling the grease sold by them "Superior Axle Grease, manufactured by S. Frazer & Co.," for the purpose of making the public believe it is the "Frazer's Axle Grease" manufactured by complainant. It is the imitation of the device used by complainants that is sought to be enjoined, and there is no reason why the bill must fall because other parties defendant, not served, are citizens of the same state as the complainant. If the trade-mark used by Frazer & Co. is an imitation of complainant's, and used to deceive the public, the defendants who appear can be enjoined from advertising that they are the exclusive agents for the sale of axle-grease put up in the packages labeled as charged, and their denial in the answer of agency, is not conclusive. I shall deny motion to dismiss and let the suit go to hearing, when it can be more clearly determined whether the trade-mark used by defendants infringes the rights of the complainant.

Motion to dismiss bill denied.

CENTRAL TRUST CO. OF NEW YORK *v.* OHIO CENT. R. CO.

In the Matter of the Intervening Petition of the COLUMBUS, HOOKING VALLEY & TOLEDO RAILWAY COMPANY, asking for its Share of Earnings under a Pooling Contract.

(*Circuit Court, N. D. Ohio, W. D. March 24, 1885.*)

RAILROAD COMPANIES—EXECUTED POOLING CONTRACT—DISPOSITION OF FUND REALIZED BY RECEIVER.

Where a "pooling contract" entered into between two railroad companies has been fully executed, and the profits derived therefrom are collected and held by a receiver of one of the companies, he will not be allowed to retain the fund thus acquired, but will be decreed to pay it over to the other company in accordance with the terms of the contract, without regard to the validity of the original agreement.

In proceedings pending in the circuit court of the United States for the district of Ohio, Western division, at Toledo, brought by the

Central Trust Company of New York against the Ohio Central Railway Company, for foreclosure of mortgage, etc., an intervening petition was filed by the Columbus, Hocking Valley & Toledo Railway Company against the receiver, John E. Martin, by leave of court first obtained, in which it claims that there is due to it a large sum of money from said receiver, on the excess of his earnings, while operating said Ohio Central Railroad under a freight pooling contract, referred to more fully in the opinion. Upon the filing of said intervening petition, an order of reference was made to A. J. Ricks, Esq., as a special master, by request of counsel, to take testimony, and report upon the three points stated in the report of said master, which follows. Upon the filing of said report, the questions made by the petition and report were heard by Justice MATTHEWS, sitting in chambers, as circuit justice, at Washington, by request of the circuit judge.

MASTER'S REPORT ON THE INTERVENING PETITION OF THE COLUMBUS, HOCKING VALLEY & TOLEDO RAILROAD COMPANY.

To the Honorable the Judges of the Circuit Court.

Under the order of reference made in the above-entitled cause, upon the intervening petition of the Columbus, Hocking Valley & Toledo Railroad Company, the undersigned was directed to report:

First. "Whether the pooling contract mentioned and set forth in said petition was renewed by the receiver subsequent to his appointment and acceptance of his office, and if not, whether he and said petitioner recognized and acted in good faith upon the belief that said contract was in force and mutually obligatory upon them." Upon this part of the order I report that the original contract was made between the Columbus, Hocking Valley & Toledo Railroad, the Ohio Central Railroad, and the Baltimore & Ohio Railroad, Companies, on the thirteenth day of January, 1883; that J. E. Martin was appointed receiver of the defendant road on the twenty-ninth of September, 1883; and that said receiver, after his appointment, while not formally renewing said contract, continued to recognize it as in force by paying his monthly assessments of the expenses of the pool commission created by said contract as originally established and apportioned under it, and by reporting to it the amount of his business arising under the same. The receiver, in his testimony on this subject, says in substance that he acted upon and recognized said contract in good faith, but did not ask for instructions from the court in regard to the continuance of that pool, for the reason that at that time it was not expected that any cash balances would ever accrue under it, because, upon the basis upon which the business of the road had theretofore been conducted, he expected to come out just about even on the pooling business at the end of the year. It therefore appears very clearly, from the testimony of all concerned, that both of said parties to the contract recognized it and acted in good faith upon the belief that it was in force and mutually obligatory upon them.

Second. The second subject referred to in said order directs the master to "ascertain and report what caused the inequalities in the earnings of said contracting parties, and whether the diminished earnings of the petitioner arose from any dereliction or fault on its part, and if so he will state what such fault or dereliction was. Upon this part of the case the master will report fully the facts and state explicitly the equities of the respective parties as he shall find them to exist." In the contract entered into, as aforesaid, the percentage of business to be allowed each of the parties thereto, was apportioned

upon the basis of the actual coal transportation of each road for some years previous. This actual business showed that the coal produced along the line of road of the petitioner entitled it to 54½ per cent., and the Ohio Central to 27 per cent., of the coal transportation business originating within the territory named in said contract. The business, as conducted under said contract by the roads named, shows that each earned about its apportioned per cent. up to some time about July, 1884. About that time the petitioner herein, without any fault on its part so far as the evidence before me discloses, suddenly lost substantially all of its coal transportation business, because of a disagreement between the owners and operators of the coal mines along its line of road, and the employes and miners therein. The petitioner was not itself a producer and miner of coal, nor had it any interest as stockholder, or otherwise, in any coal producing company along its line of road. Said disagreement between the producers and miners of coal was, therefore, a matter which it could not control, except so far as it might influence the differences between the producers and miners by concessions in prices of transportation. The evidence before me shows that such concession was made on the part of petitioner and other parties to said contract, on all coal shipped to Columbus, by way of effort to reconcile and compromise the differences between the operators and their employes, and afford them a basis for a compromise, and thereby avert the long and ruinous strike that has prevailed in the mining regions penetrated by its line of road. These differences, however, were not adjusted, and for several months there was a substantial suspension of coal transportation upon the petitioner's road. In the mean time the mines along, and tributary to, the line of the Ohio Central road continued to produce coal, and the shipments over said road increased. In this way and for this reason, large inequalities in the earnings of the parties to said contract arose, and the Ohio Central Railroad received a great excess of coal business above the percentage allotted under the contract. For the reasons above stated, it does not appear from the evidence before me that the diminished earnings of the petitioner under said contract was the result of any fault on its part.

The evidence shows that the contract which was in force when the receiver of the defendant road was appointed, and which he has since recognized, afforded to shippers of coal along the lines of the railroads which are parties thereto, rates of transportation as low, if not lower, than was charged by any other railroad companies in the state, quantities and distances being equal. The facilities afforded to shippers and the rates for transportation were uniform, and fixed for a definite period. They were not higher than had been charged the public under the sharpest competition existing before the contract was made. So far, therefore, as the facts before me show, the parties to this contract entered into it free from any conspiracy, or intent, to impose upon the public higher rates for transportation, or to give fewer facilities for the transaction of the public business, than had before been afforded by them, or than was offered by other lines in the state; and if the contract is to be enforced, they stand upon the same footing, so far as the equities between them are to be adjusted. The inequality in their earnings was not caused by fault of one, or procurement of the other, but was the result of influences neither party originated or controlled, and, therefore, if the contract is one which the court can recognize and enforce, the petitioner is justly entitled to the net profits, which have accrued to the receiver upon the excess of coal business which went over his line of road, growing out of the suspension of the coal traffic on petitioner's road, as hereinbefore stated.

Third. I am further required by the order of reference to "show what amount, if anything, is due petitioner under said contract in the event it is enforced." I have not had presented to me the detailed statement of the business done by the roads affected by this contract, as shown by their reports to the pool commission, but the testimony shows that the receiver has trans-

ported a large excess over what his percentage of business under the contract would have been, but, for various reasons stated at length by him, he claims that, even if the contract is to be enforced, it should not be literally applied as to his earnings. The petitioner, by its officers and counsel, concur in the receiver's views in this respect, and I therefore accept his figures as fair, and report that if the contract is enforced there is due to the petitioner, the Columbus, Hocking Valley & Toledo Railroad Company, from the receiver of the defendant road, the sum of \$50,000.

The parties interested were served with due notice of the hearing before me. The complainant was represented by its counsel, Swayne, Swayne & Hayes, and the receiver appeared in person and testified pursuant to notice and request from me. The petitioner was represented by Judge BURKE. All the testimony taken before me is filed herewith, marked Exhibit A, and, with this report, is respectfully submitted.

[Signed]

A. J. RICKS, Special Master.

Butler, Stillman & Hubbard and *Swayne, Swayne & Hayes*, for Central Trust Co., the complainants in the original proceedings.

Stevenson Burke, for the intervening petitioners.

MATTHEWS, Justice. The petitioner prays for an order directing the receiver in this cause to pay over to it the sum of \$50,000, in his hands, claimed to be due to it under a contract entered into January 13, 1883, between the petitioner, the Ohio Central Railroad Company, and the Baltimore & Ohio Railroad Company. The contract is of that description known as pooling contracts, and had reference to the coal business of the several roads, in respect to which they were competitors. It provided that the business and earnings of the parties should be equalized upon the basis of $54\frac{1}{2}$ per cent. to the petitioner, 27 per cent. to the Ohio Central, and $18\frac{1}{2}$ per cent. to the Baltimore & Ohio Railroad Company, the prices of transportation being fixed by commissioners appointed under the contract, and at the end of each year the joint earnings from this business, of which a separate account should be kept, were to be divided according to the same percentage, any excess received by a party to be paid over, after deducting one-half for the cost of carriage.

This contract was in force and in operation between the parties when the bill was filed in this case, and the receiver was appointed. No specific directions in regard to it were given to the receiver at the time of his appointment, or since, and thinking the contract fair, reasonable, and probably beneficial, he has continued to act under it. The percentages for division agreed upon, it appears, fairly represent the proportions according to which the business had been previously divided between the roads, when operating in competition, and the object of the arrangement was to maintain what the parties should deem to be reasonable, but remunerative, prices of transportation by taking away the motive for cutting rates. In consequence of the strike among the miners in the coal region through which their roads run, the amount of coal transported during the past year over the petitioner's road has been greatly reduced below its usual proportion, and that of the road of the Ohio Central relatively increased,

and in consequence a fund of \$50,000, net receipts arising from that excess, has accumulated in the hands of the receiver. The order to pay it over, in accordance with the terms of the contract asked for by the petitioner, is resisted by the complainant in this suit on behalf of the mortgage bondholders, who are prosecuting the suit for a foreclosure and sale. The grounds of objection are:

First, that contract is illegal, being in restraint of trade, and void, as contrary to public policy; *second*, that it is void as *ultra vires*, the Ohio Central Railroad Company having no corporate power to enter into it; *third*, that the receiver was not authorized to recognize and continue it in operation.

In my opinion the receiver was well warranted in recognizing, adopting, and continuing in operation the contract in question. As an officer of the company at the time it was made, he participated in its execution and entered into it on behalf of his company, believing it to be a reasonable, just, and useful arrangement on behalf of all the interests he was bound to consult, both public and private. He was selected and appointed as a receiver in this cause at the instance of the complainant, and the bondholders whom it represents. It was not then thought necessary or expedient to limit his discretion in the practical management of the road, thus placed in his hands, by any express instructions. The existence of this contract, it must be presumed, was well known to those who are now seeking to repudiate it; if not, it might have been by the exercise of the slightest diligence. In consequence of casualties not foreseen at the beginning, it has eventuated in the accumulation of the cash balance now in controversy. The contract has been fully executed as to the transactions and business out of which that balance has grown.

The question now presented to me is not whether an unperformed and executory contract shall be enforced, nor whether damages shall be recovered against a party who refuses to operate under it. It is whether one party, who has received all the expected benefits to be derived from it, shall account for the fruits of its performance, which by its terms belong to another, and which, contrary to its terms, it retains. The contract, whether legal or not, was not binding on the complainant or the receiver; and if objected to in season, proper instruction would have been given in reference to its recognition and adoption. Failing to take proper steps to that end, the receiver was necessarily left at liberty to exercise his own judgment and discretion in reference to it. The contract itself was a customary one among railroads, and the receiver believed it to be reasonable and fair, and that it was expedient to continue it in force. This he has done with the result already stated. Good faith requires that the proceeds arising from its operation, and which by its terms belong to the petitioner, should be paid over to it, without regard to the questions now made as to the original validity of the contract. The receiver is accordingly directed to pay over to the petitioner the amount found to be due by the master, in accordance with the prayer of the petitioner.

ROBERTS v. HILL.

(Circuit Court, D. Vermont. March 27, 1885.)

1. NATIONAL BANKS—PLEDGE TO SECURE DEPOSITOR—ACT OF INSOLVENCY.

If the officers of a national bank, at the time of pledging a note to secure a depositor who had been allowing the bank to use his money and who was apprehensive of a loss thereof, saw that the bank was approaching failure and made the pledge to keep the note out of the assets to be distributed, such pledge would be void; but if they made it to prevent failure, and expecting to prevent failure, by retaining and using the deposit to pay other depositors, it would be good.

2. SAME—PLEDGE HELD GOOD.

On examination of the circumstances of this case, *held*, that the pledge should be sustained.

In Equity.

Roberts & Roberts, for orator.

Jed P. Ladd and Henry C. Adams, for defendant.

WHEELER, J. The orator is receiver of the First National Bank of St. Albans; the defendant is administrator of the estate of D. R. McGregor. The bill is brought to set aside a pledge of a promissory note of \$8,031.35, made by the officers of the bank to the defendant's intestate on the twentieth day of February, 1884, to secure a deposit of \$8,850. The right to have the pledge set aside and recover the note or its proceeds depends entirely upon section 5242, Rev. St. There is no question about the validity of the deposit, nor but that the pledge would be good to secure it at common law. The statute makes utterly null and void all transfers of the securities and payments of the money of the bank made after an act of insolvency, or in contemplation thereof, with a view to prevent the application of the assets in the manner prescribed in that chapter, or with a view to the preference of one creditor to another, except payment of the circulating notes. What would be an act of insolvency is not defined, but would apparently be the failure to redeem the circulating notes according to section 5226, as that is the only thing which would authorize the comptroller of the currency, before the act of 1875, (19 St. at Large, 63,) to take possession of a national bank and appoint a receiver. This bank had not committed such an act of insolvency, but, beyond any fair question, was, in fact, insolvent at the time of the pledge.

The contemplation mentioned in the statute appears to be that of insolvency itself, and not of that particular act of insolvency in not redeeming the circulation. *Case v. Citizens' Bank*, 2 Woods, 23. Here was insolvency, in fact, to be contemplated, sufficient to avoid the pledge, if actually made in contemplation of it with a view to prevent the distribution of the assets ratably by a receiver, or to the preference of one creditor to another. The contemplation and view are to be those of the officers of the bank, and not of the creditor. If these

motives existed and were operative with them, no innocence or good faith on his part would save the transaction. *Case v. Citizens' Bank, supra.* When the insolvency became permanent, the view to prevent ratable distribution, or to make preferences, would, if it developed into actual existence, remain constant, and vitiate, not only all transfers of securities, but all payments of money to depositors, and to any creditors, except of the circulation. The intention of this section would seem to be to prevent the disposition of any of the money or assets to common creditors whenever the insolvency should become so apparent as to make a receivership, or an ultimate loss to some of the creditors, probable to the just apprehension of the officers, and to hold all for the benefit of all. If this apprehension adequately existed in the minds of the officers of this bank at the time of this pledge, not only this pledge but all subsequent pledges of collaterals to and payments of prior existing debts would be void. It would be manifestly unjust to make an innocent receiver of security or payment give up his, and allow others who could be no more innocent to retain theirs, received when the fate of the institution was more and more imminent.

The defendant's intestate is not shown, and does not appear to have been any relative, favorite, or friend of any officer of, or person connected with, the bank. He was a mere depositor, at a low rate of interest, for the mutual advantage of himself and the bank. There was a run on the bank by depositors, which alarmed him. He did not want his money, but wanted to be secure. The officers guarantied his deposit personally, and turned out this note to pacify him. He was dealt with as any other creditor equally importunate would have been. There was no intent to favor him over others; their motive was to retain the money. Had he received the money he would have been equally liable to refund that, under this statute, as has been shown. By mustering available assets and raising money, and a like use of securities with other depositors, they met the run for a time, by paying those who would be paid, securing those who would be paid or secured, and restoring confidence to the rest. They were striving to save the bank, and not striving to help him at the expense of the others.

The bank continued business about six weeks after this pledge. Then the officers saw that the effort to maintain it was hopeless, and stopped business. Their apprehension of the condition of the bank, and motive to prevent suitable distribution of the assets, ought to be made to appear clearly in order to justify going back so far as to the time of this pledge, and opening all pledges and payments on past debts; and their purposes and acts are to be considered in view of what they could see looking forward, and not wholly by what is apparent now looking backward. If they saw at the time of the pledge that the bank was approaching failure, and made the pledge to keep the note out of the assets to be distributed, the pledge would be clearly

void; but if they made it to prevent failure and expecting to prevent failure, it would appear to be good. The insolvency had come gradually, and not by any sudden loss which would arrest attention at once. The actual condition was as good as it had been for some time. They must have known that it was perilous, but do not appear to have lost courage, or then to have expected failure. The evidence does not satisfactorily show that they were placing money and securities where they would be kept from the effect of failure, but rather does show that at that time they were using their assets to prevent failure. Therefore, it is not found that this note was pledged with a view to prevent its application in the manner prescribed by that chapter, nor with a view to a preference of this creditor to any other.

Let there be a decree dismissing the bill of complaint, with costs.

STEAM STONE-CUTTER Co. v. SEARS and others.

SAME v. YOUNG and others.

SAME v. BATCHELDER and others.

SAME v. WINSOR SAVINGS BANK and others.

SAME v. JONES and others.

SAME v. DUFF and others.

SAME v. McCARTY and others.

(Circuit Court. D. Vermont. March 27, 1885.)

VENDOR AND VENDEE—ATTACHMENT ON WRIT OF SEQUESTRATION—NOTICE TO SUBSEQUENT PURCHASERS—REV. ST. VT. §§ 874, 875.

Attachment on a writ of sequestration, by leaving a copy of the writ with a description of the estate attached in the town clerk's office, pursuant to Rev. Laws Vt. § 874, held valid against subsequent purchasers without actual notice, without the entry in a book kept for that purpose by the town clerk of the names of the parties, date of the writ, nature of the action, sum demanded, and officer's return, as required by section 875; distinguishing *Burchard v. Fair Haven*, 48 Vt. 327.

In Equity.

Aldace F. Walker, for orator.

William Batchelder, for defendants.

WHEELER, J. These cases each involve title to distinct parcels of land under the same writ of sequestration and levy of execution that were in question in *Steam Stone-cutter Co. v. Jones*, 21 Blatchf. 138;

S. C. 13 FED. REP. 567; and *Steam Stone-cutter Co. v. Sears*, 9 FED. REP. 8. The only question made now is whether the attachment on the writ of sequestration, by leaving a copy of the writ with a description of the estate attached in the town clerk's office, pursuant to section 874, Rev. Laws Vt., was valid against subsequent purchasers without actual notice, without the entry in a book for that purpose by the town clerk of the names of the parties, date of the writ, nature of the action, sum demanded, and officer's return, as required by section 875, Rev. Laws Vt. It is claimed that this question was not decided in either of the former cases. It is understood, however, that the situation of these defendants in this respect is not different from that of the defendant *Sears* in *Steam Stone-cutter Co. v. Sears*, and that of *George, Chase, and Ray* in *Steam Stone-cutter Co. v. Jones*. They all claimed title under *Jones, Lamson & Co.*, in whose deed from the attachment debtor of the whole on record the attachment was expressly mentioned and warranted against. *Burchard v. Fair Haven*, 48 Vt. 327, now much relied upon, was before the court in *Steam Stone-cutter Co. v. Jones*, and its effect upon the titles of those subsequent purchasers fully considered.

In *Burchard v. Fair Haven* the town clerk's office was bare of the copy of the writ and return of the officer left, as well as of any entry of the attachment in a book, and the town clerk, whose duty it was to receive and keep that copy as well as to make the entry, and for whose fault the suit was brought, repudiated the claim that there ever had been such a copy there. It was for his fault in not receiving and keeping the copy as a part of the records of his office, and not for not making the entry of the attachment in a book only, that the plaintiff recovered. It was not decided there, that leaving a copy of an attachment with a description of the estate attached, did not create a lien, without the entry of the attachment in the book to be kept for that purpose, but only that, without either, the title of a subsequent purchaser without notice of the attempted attachment would not be defeated by it. The entry in the book was not only not made, but there was nothing by which to make it, and a denial that there had ever been anything from which it could be made. Here, the copy and description of the estate were always on file after they were left for record, and have since been entered in the proper book. It has always been held in Vermont that when instruments of title to land, required by law to be recorded, are left for record in the proper office, the record, when made, will relate back to the time of the leaving for record. *Bigelow v. Topliff*, 25 Vt. 273; *Essex Co. R. Co. v. Lunenburg*, 49 Vt. 143. The delay in making the entry in this case made the attachment more difficult to find, but did not remove it or vacate it. If these defendants were misled in any way to their damage by the delay, they have the responsibility of the town to look to for redress. The orator appears to be entitled to a decree in these cases similar to that made in *Steam Stone-cutter Co. v. Jones*.

Let a decree be entered, removing the cloud upon the orator's title created by the conveyances subsequent to the attachment, and for an injunction against setting up the same against the title created by the attachment and levy, with costs, in each case.

ABRAHAM and others v. WESTERN UNION TEL. CO.

(Circuit Court, D. Oregon. April 8, 1885.)

TELEGRAPH COMPANIES—BUSINESS OF—LIABILITY FOR NEGLIGENCE.

A person engaged in the business of telegraphy, or the transmission of messages for hire by means of electricity, is a public servant, and responsible to the party injured for any loss arising from his negligence in transmitting or delivering such a message; but he is not liable as an insurer of said message against errors consequent upon causes beyond his control.

Action to Recover Damages.

M. W. Fecheimer, for plaintiff.

Rufus Mallory, for defendant.

DEADY, J. This action is brought by the plaintiffs, citizens of Oregon, against the defendant, a corporation formed under the laws of New York, and doing business in the state of Oregon, to recover damages to the amount of \$1,854, caused by the alleged negligence of the defendant in sending and receiving a message for the plaintiffs between Glendale and Roseburg, Oregon. It is alleged in the amended complaint that on October 30, 1883, the plaintiff Walter Wheeler sent a message over defendant's telegraph line from Glendale to Roseburg, to his partners and co-plaintiffs, by the firm name of Abraham, Wheeler & Co., in these words:

"GLENDALE, OR., Oct. 30, 1883.

"To Abraham, Wheeler & Co., Roseburg, Or.: "Don't sell *any* wheat; hold a few days.

[Signed]

"WALTER WHEELER."

That the price demanded for transmitting said message was prepaid by the sender, in consideration of which the defendant undertook to deliver the same as written and addressed; that the defendant transmitted said message so negligently and unskillfully that the same was delivered to said Abraham, Wheeler & Co., at Roseburg, with the word "all" substituted for "any" in the original, in consequence of which the plaintiffs immediately sold 9,000 bushels of wheat, the same being a portion of a greater quantity they then had on hand, at 97½ cents per bushel, that being the market price at Roseburg therefor; but that thereafter, and on November 1, 1883, wheat was worth at that place \$1.23½ cents per bushel; and that it was the intention of said Wheeler in sending said message to have the plaintiffs hold said wheat for a time, and thereby receive the advance thereon,

and the plaintiffs would have done so, and thereby realized said advance, if said message had been truly delivered.

By the amended answer the defendant denies:

(1) Negligence in transmitting or delivering the message. (2) That the plaintiffs sold said wheat on account or by reason of the information or advice contained in said message as received by them, and avers that such sale was in fact contrary thereto. (3) That on November 1, 1883, wheat was worth at Roseburg \$1.23½ per bushel, or any more than 81 cents per bushel. (4) Knowledge as to the intention of said Wheeler in sending said message, or as to whether the plaintiffs would have realized any greater price for said wheat if said message had been duly delivered. (5) That the plaintiffs were damaged in the sum of \$1,854, or at all, by the negligence of the defendant in sending or receiving said message. And also sets up a special defense to the effect that the error in sending the message was the result of natural causes beyond the control of the defendant.

The answer also contains a statement intended either as a defense to the action, or in mitigation of the damages claimed therein, that the message in question was received and transmitted by the defendant on the condition, and subject to the agreement, that it should not be liable for any mistake in the transmission or delivery of the same, whether caused by the negligence of the defendant or otherwise, beyond the amount paid for sending the same, unless it was repeated; and that the plaintiffs did not have said message repeated, whereby they assumed the risk of any mistake occurring in the transmission thereof. To this statement or plea the plaintiffs demur, for that it does not constitute a defense in whole or in part to the action, which is for damages caused by the negligence of the defendant.

Electricity has been in successful use as a means of transmitting messages and information for about 40 years. During this time the responsibility of the person who undertakes to serve the public in this way, and the nature of his employment, have been the subject of much consideration and some conflicting judgments in the courts. With the progress of time and the marked improvements in the science of telegraphy, there has been a tendency to hold telegraph companies to a higher degree of diligence and a larger measure of responsibility in the discharge of their duties to their employers. From the first an effort was made to liken the business of telegraphy to the carriage of goods by a common carrier. But the courts, with but probably one exception, (*Parks v. Alta Cal. Tel. Co.* 13 Cal. 422,) have declined to hold the telegrapher responsible as an insurer of the accuracy of messages transmitted by him, and have limited his liability to losses arising from mistakes resulting from his negligence in the discharge of the duties of his employment.

The liability of a common carrier is twofold. The one arises from the fact that he is an insurer of the safety of the goods committed to his custody against loss from all danger or accident, except the act of God and the public enemy; and the other from the fact that he is a bailee of such goods, and as such responsible for any loss or injury

thereto consequent upon his own negligence. And the weight of authority is that he may, by contract, restrict his liability as an insurer, but not as a bailee. Care and diligence are the essential duties of his employment in this respect, and it would be contrary to public policy to allow him to contract for less, or to limit his responsibility for his own negligence.

And although a telegrapher is not an insurer, and therefore not responsible for an error in a message consequent on causes beyond his control, he is, like a common carrier, a servant of the public by reason of his employment, and bound to the exercise of care and diligence adequate to the discharge of the duties thereof, and cannot by any notice, regulation, or contract limit or control his liability for the negligence of himself or servants. As was said by Mr. Justice STRONG in *Express Co. v. Caldwell*, 21 Wall. 269:

"Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as that of carriers. Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence."

By section 17 of the act of October 17, 1862, (Laws Or. 776,) it is provided that a telegraph company doing business in this state must transmit all messages in the order in which they are received, with certain exceptions of public interest, under a penalty of \$100. This act is a recognition, as well as a declaration, of the fact that the employment of the defendant is a public one, "to be carried on," as was said by BIGELOW, J., in *Ellis v. American Tel. Co.* 13 Allen, 231, "with a view to the general benefit and for the accommodation of the community, and not merely for private emolument and advantage." And the measure of damages in an action against the defendant for a failure to perform a duty pertaining to this employment with due care and diligence is the ordinary one in actions for damages caused by a neglect of duty. Any stipulation or notice limiting the defendant's liability in this respect is void and of no effect. Notwithstanding the contract or condition under which this message is alleged to have been sent by the plaintiff, if the error in its transmission was consequent upon the negligence of the defendant, or the want of ordinary care and prudence on the part of its servants, it is liable to the plaintiffs for the damage sustained thereby. And this includes gains prevented as well as losses sustained, provided they are the natural and proximate consequence of the error or mistake.

In the case of an obscure or cipher message, of which the import or importance is not apparent to the operator, there is a conflict of authority as to whether or not the damages should be limited to the price of the message. *Candee v. W. U. Tel. Co.* 34 Wis. 479; *Hart v. Same*, 4 Pac. Rep. 658.

But the case under consideration is one in which the message, by its terms, informed the defendant of its import and importance, and

the measure of damages for a breach of the undertaking to transmit it with care and diligence is the ordinary one. It follows that the matter demurred to neither constitutes a defense to the action nor a mitigation of the damages sought to be recovered thereby, and therefore the demurrer must be sustained; and it is so ordered.

In addition to the authorities above cited, the following cases have been examined, and are referred to as bearing on the question involved in this cause from various stand-points: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Jones v. Voorhees*, 10 Ohio, 145; *True v. International Tel. Co.* 60 Me. 9; *Bartlett v. W. U. Tel. Co.* 62 Me. 209; *Redpath v. Same*, 112 Mass. 71; *Grinnell v. Same*, 113 Mass. 299; *New York & W. P. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Passmore v. W. U. Tel. Co.* 78 Pa. St. 238; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Breese v. U. S. Tel. Co.* 48 N. Y. 132; *Wann v. W. U. Tel. Co.* 37 Mo. 472; *W. U. Tel. Co. v. Fenton*, 52 Ind. 1; *White v. W. U. Tel. Co.* 14 FED. REP. 710, and note, 718.

LOGWOOD and Wife v. MEMPHIS & C. R. Co.

(Circuit Court, W. D. Tennessee. March 18, 1885.)

COMMON CARRIERS—DISCRIMINATION—RACE AND COLOR OF PASSENGERS—EQUAL ACCOMMODATIONS.

Equality of accommodation does not mean identity of accommodation, and it is not unreasonable, under certain circumstances, to separate white and colored passengers on a railway train, if attention is given to the requirement that all paying the same price shall have substantially the same comforts, privileges, and pleasures furnished to either class.

Action for the Wrongful Exclusion of a Passenger from a railroad car.

Logwood and wife are colored people living at Huntsville, Alabama. She bought a first-class ticket over the defendant's railroad to Courtland, but when she went on the platform of the ladies' car a brakeman, who had allowed several white ladies to enter, closed the door on Mrs. Logwood, and told her she must apply to the conductor of the train for permission to ride in that car, and that she could take a seat in the front car. According to her testimony and that of her witnesses, the conductor told her she must ride in the front car; that she told him she had always been allowed to ride in the ladies' car and thought she should be permitted to do so again, as she was sick and did not wish to ride in the front car, where there was swearing and smoking and whisky drinking, but that the conductor insisted upon her riding in the front car, and told her he would see that there was no swearing, smoking, or drinking.

According to the testimony of the conductor and the defendant's other witnesses, he told her he was busy then, but had always allowed her to ride in the ladies' car, and if she would be seated in the front car until he got through he would put her into the ladies' car. She

ordered her trunk off the baggage car, refused to take that train, and under instructions from her husband kept her ticket, bought another, and went to her destination on the next train in the ladies' car. Both Mrs. Logwood and the conductor testified that she had often traveled with him, and always rode in the ladies' car. The car in the rear was reserved for ladies, and such other passengers as were admitted to it. The front car was a general one, in which smoking was permitted, but on this particular occasion, according to the testimony of defendant, was newer and brighter, and in all respects equal to the rear one in appearance and comfort. Colored people were generally required to ride in the front car, unless objection was made by them, in which case proper persons were allowed to ride in the ladies' car, the plaintiffs always having been permitted to do so.

W. M. Randolph, for plaintiffs.

Poston & Poston and *L. W. Humes*, for defendant.

HAMMOND, J., (*charging the jury orally*.) Common carriers are required by law not to make any unjust discrimination, and must treat all passengers paying the same price alike. Equal accommodations do not mean identical accommodations. Races and nationalities, under some circumstances, to be determined on the facts of each case, may be reasonably separated; but in all cases the carrier must furnish substantially the same accommodations to all, by providing equal comforts, privileges, and pleasures to every class. Colored people and * white people may be so separated, if carriers proceed according to this rule. If a railroad company furnishes for white ladies a car with special privileges of seclusion and other comforts, the same must be substantially furnished for colored ladies. All travelers have to submit to some discomforts and inconveniences, and should not be too exacting, but are entitled to polite treatment, free from any kind of indignity.

The brakeman on the train having referred Mrs. Logwood to the conductor, who was the proper officer to decide upon her right to ride in the ladies' car, and she having gone to him, the question in this case must be determined by what occurred between them; and if you believe from the proof that the conductor ratified the act of the brakeman by telling her she must ride in the front car, and would not be permitted to go into the ladies' car, the company is undoubtedly liable for damages, unless you conclude from the evidence that the front car was, under the rule already announced, equal to the ladies' car. But if you believe that the conductor told her that at his convenience he would admit her to the ladies' car, and there was no unreasonable delay or discomfort in so doing, the plaintiffs cannot recover in this case.

The court announced that it adopted the opinion of Judge MORRIS in the case of *The Sue*, 22 FED. REP. 843, as a proper statement of the law of this case, and it was read in argument before the jury.— [REP.]

NEWBY and others v. BROWNLEE.

(Circuit Court, D. Kansas. March 9, 1885.)

1. TAXATION—LAND SOLD UNDER CONFISCATION ACT.

Where land has been sold under the confiscation act of July 17, 1862, the life-estate of the owner is sold and transferred to the purchaser, and no title remains in the United States to exempt such land from taxation by a state.

2. SAME—DUTY OF LIFE-TENANT.

Ordinarily, a tenant for life must pay the taxes assessed on land, if there is any income to pay them with.

3. SAME—KANSAS STATUTE.

In Kansas the land itself is taxed, and it matters not what may be the condition of the title, or who may be the owner; and unless it comes under one of the exemptions named in the statutes it is subject to its burden of the public revenue; following *Blue-Jacket v. Commissioners*, 3 Kan. 347, and *Miami Co. v. Brackenridge*, 12 Kan. 114.

4. SAME—TAX DEED—SUBSEQUENT TAXES UNPAID.

A tax deed is not invalid because the subsequent taxes had not been paid at the date of making it.

5. SAME—DESCRIPTION OF LAND.

Where the land bid off at a tax sale is described in the tax deed as "the north-east eighty acres" of a quarter section, without saying that it is in a square, this will not invalidate the deed.

Action in Ejectment. The opinion states the facts.

John Doniphan, for plaintiffs.

D. S. Alford, for defendant.

FOSTER, J. The plaintiffs, who are the heirs at law of Nathan Newby, bring this action in ejectment to recover the S. E. $\frac{1}{4}$ of section 7, township 8, of range 20 E., being 160 acres of land lying in Jefferson county, Kansas. The defendant, Brownlee, sets up a superior title to the plaintiffs', derived from a series of tax sales, and deeds made on such sales. The plaintiffs attack the defendant's title as illegal, for the reason that the land was not taxable at the time the taxes were levied, and that the tax proceedings and the tax deeds were irregular and illegal, and are null and void. The facts in reference to the title of this land are as follows: In August, 1864, this real estate was seized by the United States marshal of the district of Kansas, in pursuance of a writ issued out of the United States district court of said district, under and by virtue of the act of congress of July 17, 1862, known as the "Confiscation Act." In September following the United States attorney for said district filed in said court his libel against the property, averring that Nathan Newby, the owner thereof, was giving aid and comfort to the rebels, and was in armed rebellion against the United States, etc. After admonition duly given, on the twenty-ninth day of November, 1864, said court entered a decree of condemnation and forfeiture of said real estate to the United States. In December following a writ of *venditioni exponas* was issued to the United States marshal, and in January, 1865, he sold the said real estate under said writ to one James McCormick,

which sale was by the court confirmed in April, 1865. The land at that time was vacant, unoccupied, and without improvements, and so remained until about the year 1879, when the defendant, Brownlee, entered and took possession under his tax title, and he has since occupied said premises, and has made lasting and valuable improvements, and the premises and improvements are now worth over \$5,000. Nathan Newby died in the year 1881, and plaintiffs are his heirs at law.

The first point urged by the plaintiffs is that after the decree of condemnation and confiscation of this property it was not subject to taxation by the state, or, at most, the state could only tax the title and interest in the land which was confiscated to the United States and sold by the marshal under the writ of *venditioni exponas*. Just why this is so, the plaintiffs' counsel in his argument is not exactly clear and explicit, but raises at least the implication that such is the case because the general government still holds some title or estate in the land, perhaps in trust for the heirs of Nathan Newby; or, because the party in possession of the life-estate must keep down the taxes assessed on the land; that it is but the life-estate that is taxable. Neither of these positions can be maintained. Whatever interest or title in this land inured to the United States under the decree of condemnation and forfeiture passed by virtue of the sale to the purchaser, and thereafter the United States held no title or estate in the land. In the case of *Wallach v. Van Riswick*, 92 U. S. 213, the supreme court, speaking of the effect of a pardon as to restoring property which had been seized, condemned, and sold as this property was, use the following language:

"Considering that amnesty did restore what the United States held when the proclamation was issued, it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or expectancy."

Again, in the same case, p. 212:

"And as the fee cannot be in the United States, they having sold all that was seized, nor in the purchaser," etc.

It is conclusively settled that the estate seized, condemned, and sold, under the confiscation act of July 17, 1862, was the life-interest of the offender. *Bigelow v. Forrest*, 9 Wall. 341; *Day v. Micou*, 18 Wall. 156; *Wallach v. Van Riswick*, 92 U. S. 202. In the case last cited, the court held it unnecessary to decide where the fee remained during the life-time of the ancestor, and it is unnecessary in this case, and would be presumptuous in me, to speculate on that subject. But it is clearly decided that there is nothing left in the person whose estate has been confiscated, and nothing in expectancy which he can alienate or convey. And it is just as clearly decided that after the sale nothing remains in the United States.

There cannot be a pretext of title in the United States to exempt this land from taxation. Is there anything in the laws or statutes of

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Kansas exempting it? The first section of the statute concerning taxation (Gen. St. 1868, p. 1019) reads as follows:

"All property in this state, real and personal, not expressly exempted therefrom, shall be subject to taxation in the manner prescribed by this act." Comp. St. 1879, p. 937.

The fifth exemption named in the statutes reads as follows:

"All property belonging exclusively to this state or to the United States." St. 1868, p. 1021; St. 1879, p. 938. "Each parcel of real property shall be valued at its value in money," etc. St. 1868, p. 1025; St. 1879, p. 947.

There is nothing in the statutes of Kansas, nor in the theory of taxation, which recognizes the taxing of any particular estate or interest in land. It is the land itself that is taxed, and it matters not what may be the condition of the title or who may be the owner; unless it comes under one of the exemptions named in the statutes, it is subject to its burden of the public revenue. *Blue-Jacket v. Commissioners*, 3 Kan. 347; *Miami Co. v. Brackenridge*, 12 Kan. 114.

The question as to who shall pay the tax is quite another thing, and is a matter with which the taxing power has no concern, nor has the party buying the land at the tax sale any concern therein, unless the duty rests on him to pay the taxes. It seems to be settled by the decided cases that the tenant for life of real estate must pay the taxes, if there is any income to pay them with. *Pierce v. Burroughs*, 58 N. H. 302; *Clark v. Middlesworth*, 82 Ind. 240; *Johnson v. Smith*, 5 Bush. (Ky.) 102; *Prettyman v. Walston*, 34 Ill. 192; 1 Washb. Real Prop. (3d Ed.) 112; *Pike v. Wassell*, 94 U. S. 714. In the last cited case, the supreme court held that if the life-tenant failed to pay the taxes, the children of the person whose estate had been forfeited, being the heirs apparent, may take the proper proceedings to enforce that duty on the tenant. But suppose the heirs fail to enforce this duty on the tenant, and the property is sold for the tax, and a stranger bids it off; certainly no one would assert that it in any way concerned him, or affected his title under the tax sale. This defendant, Brownlee, was not the tenant, nor did he hold under the tenant, nor was he under any obligation to pay off these taxes, nor was he concerned in the confiscation proceedings. He appears to have been a stranger to the whole transaction, and as such bought this land at tax sale. And this brings us to the other question, the validity of the defendant's title under the tax deeds.

There are two or three objections made to these tax deeds or part of them. One objection is that all the subsequent taxes, to the year for which the property was sold, had not been paid at the time of making the deed. Another objection is that in one deed the land bid off is described as "the north-east eighty acres" of said quarter section, and does not say it is in a square.

As to the first objection, I find nothing in the law invalidating the tax deed because the subsequent taxes had not been paid at the date of making the deed. The General Statutes of 1868, p. 1058, §

112, and the Compiled Laws of 1879, p. 966, § 138, have the following provision:

"If any land sold for taxes shall not be redeemed within three years from the day of sale, the county clerk of the county where the same was sold, shall, on presentation to him of a certificate of sale, execute, in the name of the county, as county clerk, under his hand and seal, of the county, to the purchaser, his heirs and assigns, a deed to the land so remaining unredeemed, and shall acknowledge the same, which shall vest in the grantee an absolute estate in fee-simple in such lands, *subject, however, to all unpaid taxes and charges which are a lien thereon.* And such deed, duly acknowledged, shall be *prima facie* evidence of the regularity of all proceedings, from the valuation of the land by the assessor, inclusive, up to the execution of the deed."

The words which I have italicized in the above quotation indicate very clearly that a tax deed may be made where the subsequent taxes have not been paid, but the title conveyed is subject to such unpaid taxes.

The other objection is to the description of the land. It appears in the deed, dated January 22, 1878, for sale of 1873. The law in force at the time of that sale is found in St. 1868, p. 1047, § 85; and it reads as follows:

"The person at such sale, offering to pay the taxes and charges against any one piece or parcel of land for the smallest quantity of land in a square, as nearly as practicable, off from the north-east corner of the tract, or piece of land, shall be the purchaser of said quantity, located as aforesaid."

This statute fixes the shape of the piece of land bid off. It must be in a *square*, and there could be no difficulty in locating exactly the lines, and setting off the land purchased. The Statutes of 1879, p. 961, § 111, changed this section, and provides that the piece bid off shall come off the *north side of the tract*. Of course, the deed would then read, so many acres off the *north side*. Besides, there appears to have been four other sales of this *whole* quarter section for taxes, and deeds made thereon, and that whole title is now held by the defendant, Brownlee. Two of these sales were for taxes prior to 1873, and two for subsequent years, (1875 and 1877;) and all these sales appear to have been made before Brownlee entered on the land. These deeds in form are in substantial compliance with the requirements of the statute, and I am compelled to admit that the objections made to them are not well taken, although it would have gratified me to hold the contrary, and relegate the defendant to his rights under the occupying-claimant act.

Judgment must go for the defendant.

HOWES v. CAMERON.

(Circuit Court, N. D. Illinois. December Term, 1883.)

JUDGMENT—EXECUTION TO PRESERVE LIEN—REV. ST. ILL. CH. 77, § 1.

An execution is not "issued," within the meaning of section 1 of Chapter 77 of the Revised Statutes of Illinois, so as to keep the lien of a judgment on real estate alive unless it is delivered to an officer authorized to execute it, and for the purpose of having it executed. The handing of an execution to a United States deputy marshal with the express direction not to execute it until further instructions, and giving no such instructions during the life-time of the writ, will not preserve the lien.

At Law.

John I. Bennett, for Howes.

Rosenthal & Pence, for Gilmore and others.

BLODGETT, J., (*orally*.) This is a petition to set aside a levy made under an execution issued in this case by the marshal of this district. The plaintiff, Howes, recovered against the defendant on the ninth of July, 1877, a judgment in this court for \$1,978.50. On December 26, 1877, a few months after the recovery of this judgment, as will be noticed, the defendant Cameron acquired title to lot 10, in block 22, in Duncan's addition to the city of Chicago, by deed of conveyance. On the second day of December, 1878, the defendant and her husband sold and conveyed by deed, in good faith, to Jesse L. Nason, the N. $\frac{1}{2}$ of this lot, and on the twenty-second of April, 1879, the latter conveyed to Carry O. Nason; October 1, 1879, Carry O. Nason conveyed to one Erickson; October 1, 1879, the latter conveyed to Melcher, and on the twenty-fourth of April, 1883, Melcher conveyed to the petitioner; so that the petitioner is now seized of the N. $\frac{1}{2}$ of lot 10, block 22, by a series of mesne conveyances from Cameron. On the ninth of January, 1878, an execution was made out by the clerk of this court and delivered to a clerk of the plaintiff's attorney, which was subsequently returned to the clerk's office and a memorandum made on the execution docket that said writ had not been delivered to the marshal. On December 13, 1878, another execution was made out by the clerk, but not delivered to the marshal, and on the seventh of February, 1884, an execution was issued on this judgment and levied on the petitioner's lot. The petitioner asks that the levy under this execution be set aside, on the ground that she is a *bona fide* purchaser of the property after the lien of the judgment had expired, and that her property ought not to be sold, or her title clouded by this levy, or sale under it.

It appears from an affidavit of Frank I. Bennett, who was the clerk of Mr. John I. Bennett, the plaintiff's attorney in the recovery of this judgment, and the issue of this execution, that the execution of January 9, 1878, was taken by him from the clerk's office and handed to one of the United States deputy-marshals, who asked what he

wished done with it; to which Bennett replied he would have to see the attorney and get instructions, and requested the deputy to hold said writ until such instructions should be given; whereupon, as the witness states, said deputy, in accordance with his request, placed said writ away in his office to await further instructions. No instructions were given, and no memorandum or entry was made by the marshal on the writ or elsewhere showing the writ had been in his hands, and after the expiration of 90 days from the date, it was taken from the deputy and returned to the clerk's office, who filed it as of the day it was returned, and the clerk at the same time made an entry on the execution docket in this case that the execution in question had not been delivered to the marshal.

The second execution was merely made out by the clerk and handed to the attorney, who kept it in his office until the expiration of 90 days from the date, when he returned it to the clerk, who marked it filed, and also made a memorandum on the execution docket that it had not been delivered to the marshal.

Section 1 of chapter 77 of the Revised Statutes of Illinois provides that a judgment shall be a lien on the real estate of the person against whom it is issued for the term of seven years from the time it is rendered, and no longer, but when an execution is not issued on such judgment within one year from the time the same becomes a lien the judgment shall thereafter cease to be a lien. The only question is, was an execution issued on this judgment within a year from the time the judgment was rendered?

It is very clear to me that an execution is not issued, within the meaning of this statute, unless it is delivered to an officer authorized to execute it, and for the purpose of having it executed. The handing of this execution to a deputy-marshal with the express direction not to execute it until further instruction, and giving no instruction to execute it during the life-time of the writ, is not such a delivery of the writ to the officer as preserves the lien. For all the purposes of preserving the lien, the writ might as well have never been made out by the clerk. It lay inert and dead by direction of the plaintiff's attorney, and placing it in the hands of a person who happened to be a deputy-marshal with directions not to do anything with it, does not make it any better than if it had been left in the desk of the clerk or attorney, because the vitality of the writ is suspended by express direction of the plaintiff's attorney. That the deputy-marshal understood the writ was not to be executed, is, it seems to me, conclusively shown by the fact that no indorsement was made on the writ, as required by law, of the time he received it; and it is hardly possible the clerk would have made an entry to the effect the writ was not delivered to the marshal if he had not been so informed by the attorney's clerk when the writ was taken back to the clerk's office.

The supreme court in *Gilmore v. Davis*, 84 Ill. 487, says: "A delivery of such a writ to a sheriff, instructing him at the same time to

do nothing under it, is really no delivery, and confers no rights on the creditor." It is true, the case I have cited was not expressly a case like this, where a continuation of a lien by the issue of an execution was involved. That was a case between contending executions, and it was held that the delivery of a writ to a sheriff, with instructions not to execute it, was equivalent to no delivery at all. See, also, *Berry v. Smith*, 3 Wash. C. C. 60.

The case, therefore, seems to me to stand precisely the same as if no execution had been issued on the judgment until after the expiration of a year, and the lien of the judgment had ceased at the time the defendant conveyed the property in question to Jesse L. Nason, from whom the petitioner acquires title by mesne conveyances. At the time the petitioner acquired title, the record in this case showed that the execution had never been delivered to the marshal, and justified the purchaser from the defendant in assuming that the judgment had ceased to be a lien upon this property at the end of the year from the time the judgment was rendered. I am therefore of the opinion that the plaintiff has no right to levy an execution on petitioner's property. An order will be entered setting aside the levy under the execution upon the N. $\frac{1}{2}$ of lot 10, in block 22. The execution will not be quashed because, possibly, it may reach other property.

MOSHER v. ST. LOUIS, I. M. & T. RY. CO.¹

(Circuit Court, E. D. Missouri. March 20, 1885.)

CARRIERS OF PASSENGERS—PURCHASER OF RAILROAD TICKET BOUND TO COMPLY WITH ITS CONDITIONS.

A limited railroad ticket, by an express provision of a contract therein contained and signed by the purchaser, was good for a return trip, provided the purchaser identified himself to the "authorized agent" of the railroad at his destination, and the ticket was "officially signed, and dated in ink, and duly stamped by said agent." The purchaser presented himself at the proper office at a proper time, but the authorized agent was absent, and failed to appear before the train, which the holder of the ticket desired to take, started. He therefore proceeded on his return trip without complying with the condition, and presented said ticket to the conductor and explained said circumstances. The conductor refused to accept it and demanded the usual fare, which being refused, he removed the passenger from the train. *Held*, that such removal gave the holder of said ticket no cause of action.

Demurrer to Amended Petition.

The amended petition differs from the original (17 FED. REP. 880) in stating that the plaintiff presented himself and ticket at the business office of the defendant's "authorized agent" at Hot Springs, his

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

original destination, "during business hours, and a reasonable time before the time of departure of its train for St. Louis that plaintiff desired to take and did take, and was ready and willing, and then and there offered, to identify himself as the original purchaser of said ticket," etc., but that there was no authorized agent there, and that none appeared before the departure of the train which the plaintiff desired to and did take.

For opinion on motion to remand, see 19 FED. REP. 849.

E. P. Johnson and *William M. Eccles*, for plaintiff.

Bennett Pike, for defendant.

BREWER, J., (*orally*.) The question in this case has been argued the third time in this court. I do not see that this amended petition changes the substantial facts in any respect. It still appears, as heretofore, that the plaintiff purchased a ticket called a round-trip ticket from here to Hot Springs and return. That ticket contained an express contract, which in terms provided that it should be presented to the station agent at Hot Springs, and by him stamped upon the back, after being satisfied that the person presenting it was the person to whom the ticket was issued. It was a limited ticket with special rates. Upon that ticket the plaintiff went to Hot Springs, no objection being made. He was ready to return, but the agent not being present at the ticket office at Hot Springs, the ticket was not presented to him, the holder was not identified, nor the ticket stamped by him. With that ticket unstamped, without any identification, the plaintiff started to come back to St. Louis. He rode from Hot Springs to Malvern without objection, but from Malvern, coming this way, upon the Iron Mountain road, the conductor objected and refused to take that ticket. The plaintiff was removed from the train, and he brings this action to recover damages for the expulsion.

I dissent entirely from the construction placed upon the ticket by counsel at this time, and now for the first time. Heretofore it was conceded that the ticket required upon its face an indorsement stamped by the station agent at Hot Springs. This time counsel seems to claim that it did not require anything of the kind. I think it did. The language is plain.

The authorities which have been cited by counsel do not come up to this case, for here, when the plaintiff took that ticket he entered into an express contract. It is not a question of implied contract, or of rights independent of a contract. The plaintiff took that ticket, signing it at the time he took it, thereby creating an express contract between him and the railroad company, by which the ticket was to be good for a return passage when, and only when, indorsed by the agent at Hot Springs, and when the owner and holder had been identified there to his satisfaction. The conductor, when the ticket was presented, saw no stamp upon it. The plaintiff had not been identified, and the rules of the company, binding upon him as a conductor, required him to remove the party unless he paid his fare. Now, can

it be that the railroad company is responsible because the conductor did that which, by the rules of the company,—reasonable rules, too,—in pursuance of his duty, he ought to have done? Grant that there was an implied contract that the station agent should have been at the Hot Springs depot. If the plaintiff had sued for a breach of that contract, and had asked the amount which he was compelled to pay in order to purchase a return ticket, then a very different question would have arisen. But here he relies on the fact that the expulsion from the train was unlawful, because the conductor ought to have taken his statement instead of that evidence which was provided by the contract, viz., identification and the stamp of the agent at Hot Springs.

It certainly would introduce a very uncertain rule of procedure if a conductor could not rest upon the faith of the ticket which is presented to him; if he is bound to act as a judicial tribunal, and take testimony and inquire into the excuses or reasons for the non-perfection of a ticket which is presented to him. The party took the ticket upon the face of which was the express stipulation that before it should be good for a return passage the holder should be identified by the agent at Hot Springs, and he should stamp that ticket on the back. Now, the party says: "Why, I wanted to prove to the railroad conductor that I was the man—the party who took that ticket in the first instance." Can the courts cast upon the conductor the duty of entering upon a judicial investigation? Of course the conductor could not at the instant secure counter-testimony, and he would be bound to take the statement of the party as to the facts of the case independent of the express language of the ticket. I do not think that the conductor is bound to do anything of the kind. I think he has a right to rely upon the language of the contract as expressed in the ticket. If the party was injured by the negligence or wrong of somebody else, he should have paid his fare back and then sued to recover the amount which he had been compelled to pay owing to the omission, negligence, or misconduct of the agent at Hot Springs.

As I said, this is the third time this question has been presented by demurrer, and while the petition has been changed from time to time, yet the substantial facts still remain to-day as they were in the first instance. The demurrer will be sustained.

The party, of course, will have his exceptions. Judgment will be found for the defendant, and as the *ad damnum* clause is over \$5,000, he can take it to the supreme court of the United States, and there settle the question which by it has not yet been determined definitely. It has been determined one way and another by the courts of the different states, but the question whether a conductor is justified in acting on the letter of the ticket presented to him, or is bound to take the statement of the passenger as to matters concerning which the ticket makes express provision, and whether, if he mistakes, the company is responsible, has not yet been settled by the supreme court of

the United States, but can be settled in this case if the plaintiff desires.

The demurrer will be sustained, and judgment entered for the defendant.

In re AH PING.

(Circuit Court, D. California. March 30, 1885.)

1. CHINESE IMMIGRATION—MERCHANT TEMPORARILY ABSENT—RIGHT TO RETURN WITHOUT CERTIFICATE.

The sixth section of the Chinese restriction act of 1882, as amended by the act of 1884, is not applicable to a Chinese merchant, one of a firm residing and doing their principal business in the United States, who temporarily departed therefrom before the passage of said act to attend to a branch of the said firm's business in British Columbia, and who returned to the United States after the passage of said act; and he may re-enter the United States without producing the certificate required thereby.

2. SAME—CONSTRUCTION OF RESTRICTION ACTS.

Section 6 of the restriction act is not applicable to Chinese subjects, residents of the United States, who left the United States for foreign countries for temporary purposes, intending to return before the passage of the amendatory act of 1884, having a right to return at the time of their departure, and who did not return till after the passage of the act; nor to Chinese subjects, residents of the United States, departing for temporary purposes of business or pleasure since the passage of the act.

Appeal from District Court.

Thos. D. Riordan, for petitioner.

S. G. Hilborn, U. S. Atty., *contra*.

Before SAWYER and SABIN, JJ.

SAWYER, J. This is an appeal from the district court. The petitioner is a Chinese subject of the Mongolian race, a merchant, not a Chinese laborer, and a member of the old and well-known firm of Hop Sing & Co., doing a mercantile business in the city and county of San Francisco, of which firm he has been a member since 1877. He resided in the United States continuously for the period of eight years prior to his temporary visit to China. In 1879 he departed from California for the purpose of visiting China, and returned to the United States on November 30, 1881, before the passage of the original Chinese restriction act. He remained at San Francisco from the last-named date, attending to the business of his said firm, until February 1, 1882, when he departed for Victoria, British Columbia, to temporarily attend to the business of the firm, which has a branch house at that place. On July 19, 1884, after the passage of the Chinese restriction act, he departed from Victoria, and arrived at the port of San Francisco by sea July 23, 1884. He did not produce any certificate of the kind required by section six of the restriction act as amended in 1884, or as required by the act of 1882. The question upon this state of facts is whether said Ah Ping is entitled

to land, or whether the sixth section of the restriction act, as amended by the act of 1884, is applicable to a Chinese merchant, one of a firm residing and doing their principal business in the United States, who temporarily departed therefrom before the passage of said act to attend to a branch of the said firm's business in British Columbia, and who returned to the United States after the passage of said act. I have never had occasion before to consider this precise question. Although it may be possible, it would be impracticable, for the petitioner to go to China, and obtain the certificate required by that section; and if the provisions of the section are applicable, no other evidence is admissible. If section 6 is applicable, then the petitioner is not, otherwise he is, entitled to land.

The question at issue depends upon a construction of the clause of section 6: "*Every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States,*" shall obtain the permission of and be identified as so entitled in the mode provided. This, with the clause in the same section making the certificate the sole evidence as to those to whom it is applicable, is the only provision, either in the treaties in force or the act, putting any limitation upon the right of a Chinese merchant to come and go of his own free will, without any limitation or legal obstruction. The only equivocal words in the clause, taken literally, would seem to be, "who shall be about to come to the United States." Does this phrase mean persons residing or domiciled abroad who leave their residence or domicile "to come to the United States" either for travel or pleasure, or to take up their residence here, or for other purposes? or does it also include Chinese subjects already domiciled in the United States, having their residence and business here, and who left the country temporarily before, or who shall leave it after, the passage of the act, for temporary purposes, with the intention of returning after the accomplishment of such purposes to their residence in the United States? We are satisfied, upon the rules of construction and principles established by the supreme court of the United States in *Chew Heong v. U. S.* 5 Sup. Ct. Rep. 255, that this provision should be so construed as not to embrace the latter class. To give the section any other construction would be to bring the act into direct conflict with the treaty, which the supreme court says should not be done if such a construction can be avoided. The object of the act is, undoubtedly, to prevent the increase in this country of the number of Chinese laborers, and this provision is designed to furnish means for readily identifying parties entitled to enter the United States. As to those domiciled in foreign countries, there is no ready means in this country for their identification. In the countries whence they propose to come, the means of ascertaining the facts are at hand; hence the provision. As to those resident or domiciled in this country, we have ourselves the best means of identifi-

cation; while as to many of them, even in their native country, and much less when they are temporarily in other foreign countries, there is no practicable means of either identification or for procuring the certificate prescribed.

The United States statutes do not now, nor have they ever, required or provided for the issue of any certificate in this country to resident Chinese, other than laborers, who are about to depart temporarily, for business or pleasure, either to China or other foreign countries. There are many Chinese merchants in California who have been domiciled in the state from 20 to 35 years. Our own means of identification of such persons are greatly superior to those of any other country, even that of their nativity. To require such parties, every time they go to another country, to perform the required acts abroad, would be utterly impracticable, and practically tantamount to an absolute refusal to permit their return.

The treaty between the United States and China of 1868, commonly called the "Burlingame treaty," guaranties to Chinese subjects the right, without any conditions or restrictions, to come, remain in, and leave the United States, and to enjoy all the privileges, immunities, and exemptions enjoyed by the citizens and subjects of the most favored nation. 16 St. 740. The treaty of November 17, 1880, puts no limitation upon this right, and does not authorize, expressly or by implication, any legislation of congress putting any limitation upon the rights of Chinese, other than "Chinese laborers." The language of the treaty is, "The limitation or suspension shall be reasonable, and shall apply *only* to Chinese who may go to the *United States as laborers, other classes not being included in the limitations.*" 22 Rev. St. 826. On the contrary, articles 2 and 3 of the latest treaty in express terms guaranties that all Chinese of any class, "now either permanently or temporarily residing in the territory of the United States, shall be secured the same rights, privileges, immunities, and exemptions as are enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by the treaty." There is nothing, therefore, in any of the treaties, that, expressly or by implication, authorizes congress to put any restriction upon the right to come and go of such parties, while in other respects they are expressly placed upon the footing of all other most favored foreigners. If, then, there is anything in the restriction act that puts a limit upon these rights, such limitation is a direct violation of the express provisions of the several treaties with China now in force. While such a provision in an act of congress would, undoubtedly, repeal the conflicting provisions of the treaties, as we have always heretofore held, yet, under the late decision of the supreme court, courts should, if possible, so construe the act of congress as not to bring it into conflict with treaty stipulations. Upon the principles established in the case cited, we are satisfied that the act can be fairly construed so as not to include this case. Section 1 provides in explicit terms, the

literal meaning of which cannot well be misunderstood, that "during such suspension it shall not be lawful for *any Chinese laborer to come from any foreign port or place, or, having so come, to remain in the United States.*" And section 2 makes it an offense for the master of any vessel to "knowingly bring within the United States on such vessel, and land or attempt to land, or permit to be landed, *any Chinese laborer from any foreign port or place.*" This language, without the limitation put upon it by the provisions of section 3, that it shall not apply to persons within the United States at the date of the treaty, is as broad and specific as it is possible to be, and, literally construed, includes every individual laborer of the Chinese race. Yet the supreme court, after quoting those provisions of sections 1 and 2, explicitly say, in substance, that if they had *stood alone, without the limiting clause of section 3*, its construction of the act would be the same as it is now. The exact language of the court, speaking through Mr. Justice HARLAN, is:

"If these sections constituted the entire legislation in reference to the coming to this country of Chinese laborers, the court, under the established rules for the interpretation of statutes, would hold that they did not apply to Chinese laborers who by their residence in the United States, at the date of the last treaty, had acquired the right to go and come of their own free will, and to enjoy such privileges, immunities, and exemptions as were accorded here to citizens and subjects of the most favored nation. For since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputes to congress an intention to disregard the plighted faith of the government; and consequently the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty. The utmost that could be said in the case supposed would be that there was an apparent conflict between the mere words of the statute and the treaty, and that by implication the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure." 5 Sup. Ct. Rep. 259.

This language, it is true, goes further than was absolutely necessary under the facts of that case; but it is the deliberate statement that the court would have so held, had the facts required it. Such a deliberate announcement, made under the circumstances of the case, we cannot regard as a mere *dictum*, or the expression of the individual opinion of the judge delivering the judgment. We look upon it as binding upon this court as a rule of decision. The court simply apply the universally recognized rule that the repeal of a statute or treaty by implication is not favored. In this case the clause of section six, under consideration, is less specific, as the words, "who shall be about to come into the United States," are more ambiguous, and are fairly open to the construction upon the language itself, in view of the surrounding circumstances, that they are only applicable to those coming for the first time, or to persons, having no present domicile or residence in the United States, but having their actual residence or domicile in a foreign country, about to come into the United States

either on business, for travel, or as temporary or permanent residents.

At the time the petitioner left his residence in San Francisco for British Columbia, on the business of his firm, both under the treaties and under the laws of the United States then in force, he had a legal right to return without any conditions or restrictions not applicable to subjects of any other or "the most favored nation." He had no reason to anticipate any change of the law. At his departure he had a vested right under the treaties and laws then in full force to return. He had a right to rely on the laws as they then were. If, by the act in question, it was intended to cut off this right of return, then it was the deliberate intention of congress to violate the treaty, and cut off a right vested in the petitioner both by the treaties and other laws of the land. As we have seen, the act must, if possible, be so construed as not to work this wrong. The supreme court, in support of the construction given to the act in the case cited, further observes:

"To these [reasons] may be added the further one that courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."

To give the construction insisted on by the United States attorney would be to give the act a retrospective operation which would injuriously affect the right of the petitioner to return, vested under the treaties and laws in force at the time of his departure, for temporary purposes, to British Columbia. And, as we have seen, there is less ground for holding that the petitioner is included within the purview of the act than in the case decided by the supreme court, upon the hypothesis assumed in the paragraphs quoted from the decision.

The following language of the supreme court, in *Chew Heong's Case*, is equally applicable to the petitioner in this case:

"It is also said, in support of the judgment, that the sixth section is significant, in that it prescribes the mode for the coming to this country of Chinese persons, 'other than a laborer, who may be entitled by said treaty and this act to come within the United States,' but fails to provide the means for the return and identification of Chinese laborers who were entitled by the treaty to return, but who were out of the country when the act of congress was passed. But this argument, like the one just alluded to, only proves that congress, while making provisions for the coming of persons who were entitled to come, other than laborers, omitted to make special provision in reference to the latter, and consequently left them to stand upon their rights as secured by the treaty, and, if their right to enter the United States was questioned, to prove in some way consistent with the general principles of law that they belonged to the class entitled to go and come." 5 Sup. Ct. Rep. 266.

With as good reason may it be said that congress, while providing for the case of Chinese, other than laborers, domiciled in foreign countries, not residents of the United States, and having no vested right to return as present residents of the United States, temporarily absent on business or pleasure, "who shall be about to come to the United States," "omitted to make any special provision in reference

to" Chinese residents of the United States temporarily absent, with a right to return, at the date of the passage of the act, or who, after the passage of the act, temporarily leave the United States for foreign countries on business or pleasure; "and consequently left them to stand upon their rights as secured by the treaty; and, if their right to enter the United States was questioned, to prove, in some way consistent with the general principles of law, that they belonged to the class entitled to go and come."

If we have interpreted the principles established by the supreme court aright, the result is that section 6 of the restriction act is not applicable to Chinese subjects, residents of the United States, who left the United States for foreign countries for temporary purposes, intending to return, before the passage of the amendatory restriction act,—having a right to return at the time of their departure,—and who did not return till after the passage of the act; nor to Chinese subjects, residents of the United States, departing for temporary purposes of business or pleasure since the passage of the act. This is the construction acted upon by the executive department of the government, and, we think, is fully justified in these particulars by the decision of the supreme court.

It results that the judgment of the district court must be reversed, and the petitioner discharged. It is but just to say that the judgment of the district court was rendered before the receipt here of the decision of the supreme court in *Chew Heong's Case*. If there are any expressions in any of my former opinions apparently inconsistent with the views here adopted, they are in opinions rendered before the decision of the supreme court in the case cited, and they had special reference to the facts in the case decided, and no reference to the point now involved.

Let the judgment of the district court be reversed, and the petitioner discharged.

MACKIN and another v. UNITED STATES.

(Circuit Court, N. D. Illinois. March 24, 1885.)

1. CRIMINAL LAW AND PROCEDURE—WRIT OF ERROR TO DISTRICT COURT—STAY OF SENTENCE—ACT 1879, § 1.

Under section 1 of the act of 1879 a writ of error is not a writ of right, but to be allowed in the discretion of the circuit judge, and if he allows it, it is also in his discretion whether he will stay the sentence.

2. SAME—WRIT AND STAY, WHEN GRANTED.

If, upon the errors complained of, there be any doubt, or room for fair debate, the accused should not be denied an opportunity to take the deliberate judgment of the circuit court upon the rulings of the district court, if those rulings have affected the judgment and sentence of that court; and in such a case the proceedings under the sentence should be stayed. Writ of error allowed, and proceedings stayed.

Petition in Error.

R. S. Tuthill and J. R. Doolittle, for the Government.

J. B. Hawley and I. N. Stiles, for the Citizens' Committee.

H. W. Thompson, E. A. Storrs, and Judge Turpie, for defendants in error.

GRESHAM, J. The prosecution in this case was commenced under section 5440, Rev. St., by information filed by the district attorney, containing seven counts, charging that the defendants conspired to commit the offenses described in sections 5403, 5511, and 5512. Gleason, Mackin, and Gallagher were convicted upon all the counts, and the two latter were sentenced to pay a fine of \$5,000 each, and to imprisonment in the penitentiary at Joliet for two years. Beihl was acquitted. Mackin and Gallagher, by their petition, ask the circuit for a writ of error, and for a stay of sentence until the rulings of the district court shall have been reviewed.

The first count in the information charges that at the late election a large number of votes were cast at the second election precinct of the eighteenth ward of the city of Chicago, in Cook county, for a representative in congress, and for state and county officers; that the judges of election canvassed the votes, and the proper clerks made two tally-lists showing the number of votes received by each candidate; that on the day after the election the judges and clerks certified on each poll-book the number of votes cast for each person voted for; and thereupon, one of the poll-books with the certificate indorsed thereon, and one of the tally-lists, together constituting the return from such precinct, properly enveloped and sealed, were delivered by one of the judges to the county clerk and his deputies at the clerk's office, whose duty it was to safely keep and guard the same; and that Mackin, Gallagher, Gleason, and Beihl conspired to break open such package, mutilate and alter the certificate, destroy the tally-list, and substitute in its place a false and spurious paper. The separate acts charged to have been done in furtherance of the conspiracy are:

(1) That Gleason and Beihl made opportunity for and permitted the package to be broken open, and the return taken therefrom, altered, and falsified. (2) That Mackin and Gallagher unlawfully broke open the package and removed therefrom such return. (3) That Gallagher unlawfully mutilated and altered such certificate by erasing the word "four" in the sentence "Henry W. Leman had four hundred and twenty votes for state senator," and wrote in place thereof the word "two," so as to make the sentence read, "Henry W. Leman had two hundred and twenty votes for state senator;" and erased the word "two" from the sentence "Rudolph Brand had two hundred and seventy-four votes for state senator," and wrote in place thereof the word "four," so as to make the sentence read "Rudolph Brand had four hundred and seventy-four votes for state senator." (4) That Gallagher made a false and spurious paper, and substituted the same in place of the genuine list; and (5) that Mackin and Gallagher unlawfully made way with and destroyed the genuine tally-list.

The second and third counts embrace the ballots, as well as the other papers described and embraced in the first count.

The fourth count charges that the defendants conspired to interfere with Michael Ryan, the clerk of Cook county, and such two justices of the peace as he might associate with him in the discharge of his duties, in opening and canvassing the several returns of the election within Cook county, such interference to be effected by mutilating and altering the certificate on the poll-book deposited in the clerk's office before the opening and canvassing of the returns from the second precinct, and by removing from the county clerk's office, and destroying, the tally-list deposited therein, and substituting for and in place thereof a false and spurious paper, purporting to be such tally-list; and that in furtherance of this conspiracy the defendants altered the certificate on the poll-book, making it appear that Leman had received for state senator the number of votes cast for Brand, and that the latter had received the number of votes cast for Leman; and that the defendants removed from the clerk's office, and destroyed, the tally-list deposited therein, and substituted for and in place of it a false and spurious paper.

The conspiracy charged in the fifth count was to destroy the papers described in the fourth count, and, in addition thereto, a large number of ballots which had been deposited in the clerk's office. In furtherance of this conspiracy, it is charged that the defendants destroyed the ballots, as well as the other papers deposited in the clerk's office, and substituted in their place spurious ballots and papers.

The sixth count charges that the returns of the poll of the second precinct had been deposited in the clerk's office, as stated in the previous counts; and that the defendants conspired to steal, carry away, and destroy part of such returns, to-wit, the tally-list; and that to effect the object of this conspiracy they unlawfully did steal and destroy such tally-list, and substitute for it a fabricated tally-list.

The seventh count charges that the defendants conspired to steal from the county clerk's office a large number of ballots, and one of the poll-books deposited therein as part of the return of the election at such second precinct, and destroy the same; and that in furtherance of this conspiracy the defendants actually did steal, from the clerk's office, and destroy, a large number of the ballots and the poll-book so deposited therein, and substituted in the place thereof spurious papers, purporting to be the genuine ballots and poll-book.

The first, second, and third counts are based upon sections 5515 and 5512; the fourth and fifth counts upon section 5511; and the sixth and seventh counts upon section 5403.

Section 5515 declares that every officer of an election at which any representative or delegate in congress is voted for, whether such officer be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof, or who violates any duty

so imposed, or knowingly does any act thereby unauthorized with intent to affect any such election, or the result thereof, or who fraudulently makes any false certificate of the result of such election in regard to any such representative or delegate, or who withholds, conceals, or destroys any certificate or record so required by law, respecting the election of any such representative or delegate, or who neglects or refuses to make and return such certificate, as required by law, shall be punished, etc.

Section 5512 declares that if, at any registration of voters for an election for representative, or delegate in congress, any person, by force, threats, menace, intimidation, bribery, reward, or offer or promise thereof, interferes with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induces any officer of registration to violate or refuse to comply with his duties, or, if any such officer or other person who has any duty to perform in relation to such registration or election in ascertaining, announcing, or declaring the result thereof, or in giving or making any certificate, document, or evidence in relation thereto, knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, every such person shall be punishable, etc.

Section 5511 declares that if, at any election for representative, or delegate in congress, any person, by force, threats, intimidation, bribery, reward, or offer thereof, unlawfully prevents any qualified voter, of any state or territory, from freely exercising the right of suffrage, or in any manner interferes with any officer of such election in the discharge of his duty, or by any such means, or other unlawful means, induces any officer of election, or officer whose duty it is to ascertain and announce, or declare, the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same, he shall be punished, etc.

Section 5403 declares that every person who willfully destroys, or attempts to destroy, or with intent to steal or destroy, takes and carries away any record, paper, or proceeding of a court of justice, filed or deposited with any clerk or officer of said court, or any paper, or document, or record, filed or deposited with any such public officer, or with any judicial or public officer, shall, without reference to the value of the record so taken away, be punished, etc.

Section 59, c. 46, Rev. St. Ill., provides that the ballots counted by the judges of election, after being read, shall be strung upon a thread in the order in which they have been read, and then carefully enveloped and sealed up by the judges, who shall direct the same to the officer to whom by law they are required to return the poll-books, and shall be delivered, together with the tally-books, to such officer, who

shall carefully preserve said ballots for six months, and at the expiration of that time shall destroy them without the package being previously opened: provided, that if any contest of election shall be pending at such time, in which such ballots may be required as evidence, the same shall not be destroyed until such contest is finally determined.

Section 51 provides that when the votes shall have been examined and counted, the clerks shall set down in their poll-books the name of every person voted for, written at full length, the office for which such person receives such votes, and the number he did receive, the number being expressed in words at full length; such entry to be made, as nearly as circumstances will permit, in a prescribed form.

Section 62 provides that such certificate, together with one of the lists of voters, and one of the tally-papers, having been carefully enveloped and sealed up, shall be put into the hands of the judges or board of election, who shall, within four days thereafter, deliver the same to the county clerk or his deputy, at the office of the county clerk, and when received, such clerk or deputy shall proceed to open, canvass, and publish the returns from each precinct or election district as provided by law.

Section 71 provides that within seven days after the close of the election the county clerks of the respective counties, with the assistance of two justices of the peace of the county, shall open the returns and make abstracts of the votes in the form prescribed; the votes for governor and other state officers on one sheet, and the votes for representatives to congress on another sheet.

Motions were made at the proper time to quash the information, in arrest of judgment, and for a new trial, all of which were overruled by the district judge. The fifth amendment to the constitution of the United States declares that no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury. The defendants were tried on an information filed by the district attorney, and not on an indictment found by a grand jury; for which reason it is claimed the trial, conviction, and sentence were illegal.

It is further urged on behalf of the defendants that the only ground upon which the jurisdiction of the district court can be maintained is that the acts charged in the information were done to influence the election of a representative in congress, and that the information contains no such averment. The sixth and seventh counts charge that the defendants conspired to violate section 5403 by stealing from the county clerk's office, where they had been deposited as required by law, the tally-sheets, poll-book, and ballots; and that they actually did steal, carry away, and destroy such papers. Congress passed an act in 1853, (10 St. at Large, 170,) entitled "An act for the prevention of frauds upon the United States treasury," the fourth and fifth sections of which were carried forward into the Revised

Statutes as section 5403. It is claimed that the clerk's office is not a public office, within the meaning of this section; that it contemplates public offices of the United States only; and that, therefore, the district court had no jurisdiction of the offenses charged in the sixth and seventh counts. Other errors are assigned, which need not now be noticed.

The circuit court, under section 1 of the act of 1879, has jurisdiction of writs of error in all criminal cases tried before the district court, where the sentence is imprisonment, or a fine exceeding \$300. Section 2 provides that the defendant may petition for a writ of error on the judgment of the district court in the cases named in section 1, which petition shall be presented to the circuit judge or circuit justice, who, on consideration of the importance and difficulty of the questions presented in the record, may allow a writ of error, and may order that such writ shall operate as a stay of proceedings under the sentence; but the allowance of the writ shall not so operate without such order. The statute does not say that the circuit judge or circuit justice shall allow the writ of error, and make it operate as a stay of proceedings. The language is that the circuit judge or circuit justice, "on consideration of the importance and difficulty of the questions presented in the record, may allow a writ of error." It is plain that under this statute a writ of error is not a writ of right. It is in the discretion of the judge to whom the application is made to allow the writ or deny it; and if he allows it, it is also in his discretion whether he will stay the sentence. Of course, this discretion is a legal one, and in its exercise the defendant should have the benefit of any doubts arising upon the questions of law presented by the record. If, upon the errors complained of, there be any doubt, or room for fair debate, the defendants should not be denied an opportunity to take the deliberate judgment of the circuit court upon the rulings of the district court, if those rulings have affected the judgment and sentence of that court, and in such a case, the proceedings under the sentence should be stayed. A different construction of the statute would defeat the manifest intention of congress. *U. S. v. Whittier*, 11 Biss. 356.

I cannot say the record presents no question of sufficient difficulty and importance to entitle the defendants to a writ of error, and an order staying proceedings under the sentence.

The sole question now decided is that the defendants are entitled, under the statute of 1879, to have the rulings of the district court reviewed by this court, and a stay of proceedings until that is done.

GOLD & STOCK TELEGRAPH CO. *v.* COMMERCIAL TELEGRAM CO. and others.

(Circuit Court, S. D. New York. April 1, 1885.)

1. PATENTS FOR INVENTIONS—CALAHAN REISSUE FOR TELEGRAPHIC PRINTING INSTRUMENTS FOR REGISTERING STOCKS—VALIDITY—INFRINGEMENT.

Reissued letters patent No. 3,810, granted to plaintiff as assignee of Edward A. Calahan, January 25, 1870, for an improvement in telegraphic printing instruments for registering prices of gold and stocks, construed, and the second claim thereof held infringed by the Field instrument used by defendants.

2. SAME—FOREIGN PATENT—LIFE OF UNITED STATES PATENT.

Where a foreign patent is published after the issue of a patent in the United States, although it bears date previous to such issue, the life of the United States patent will not be affected.

3. SAME—SECOND CLAIM OF CALAHAN PATENT.

The second claim of the reissued Calahan patent does not enlarge the original claim, and is valid.

In Equity.

C. L. Buckingham and Dickerson & Dickerson, for plaintiff.

Samuel A. Duncan and Roscoe Conkling, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the defendants from the infringement of reissued letters patent No. 3,810, granted to the plaintiff, as assignee of Edward A. Calahan, January 25, 1870, for an improvement in telegraphic printing instruments for registering the prices of gold and stocks. The original patent was dated April 21, 1868. Upon the trial of the case, infringement of the second claim only of the reissue was alleged. The claim is in these words:

"Two or more type-wheels moving independently and controlled by magnetism, and arranged so as to print jointly or separately upon one strip of paper in two or more lines, substantially as specified."

To understand and construe the claim which is in controversy, it is important to know the state of the art at the date of the invention. In this case the defendants took no testimony, and therefore the history of the art, so far as it relates to this claim, is to be learned from the reference which was made to it in the cross-examination and subsequent examination of the plaintiffs' expert. The Theiler, French, and the Johnson, English, patent for the Theiler invention, which seems to be conceded to have embodied the state of the art at the time of the Calahan invention, are not in evidence; but a general statement, and one which will be sufficient, can be given of the extent of the advance which Calahan made.

Theiler had a two-wheel instrument, the wheels being moved by one electro-magnet, and being geared together, and necessarily rotating together. Letters were placed upon one wheel, and figures were placed upon the other, and the letters were printed upon one line, and the figures were printed upon another line, of the same tape by depressing the corresponding type-wheel. But it was necessary to

have complicated mechanism, so as to prevent impressions from one wheel when the other alone was being printed from. Calahan printed letters in one line, and figures in another line, of a tape by the aid of two type-wheels, one of which could be rotated to the exclusion of the other, and a single press-pad. His wheels moved or rotated independently of each other, while in the Theiler machine one wheel could not be moved without rotating the other. He says in his specification that his invention was intended, among other things, to dispense with the complicated mechanism theretofore made use of to cause an impression to be made when the type-wheel had been brought to a proper position, and describes his device as follows:

"A magnet and armature are employed in effecting the movement of the type-wheel, so that the same is turned to the required position, and then, by an independent motion separately controlled from that of the type-wheel, the impression is made, so that the type-wheel can remain after it is adjusted, or be again moved previous to the impression being made. The impression is made on a strip of paper by two type-wheels, so that the printing is in two lines, and the figures and fractions for denoting the prices or quotations are contained upon a wheel, and combined therewith. Letters are provided for printing on the same strip of paper, to denote the article to which the quotations relate. As the different machines will generally be but a short distance apart, it is preferred to make use of two or more wires communicating through the entire circuit of machines. One of these wires transmits the pulsations of electricity that act upon a magnet, and adjust the type-wheel to the proper letter or number. The other wire transmits the pulsations of electricity which, acting in a magnet, produce the impression upon the paper. In the drawings three circuit wires are represented: one for the alphabet-wheel, another for the number, or figure, wheel, and the third for giving the impression; but the number of wires employed is unlimited. * * * The two type-wheels, *k* and *l*, although on separate shafts, stand contiguous to each other, so as to be impressed separately or jointly upon the same strip of paper that is fed along beneath them, the impression from the respective wheels forming two different lines of printing. * * * Each of the wheels, *l* and *k*, has a blank space, that is turned towards the paper while the other wheel, only, is being printed from."

This blank space prevents the wheel, which for the time being it is not desired to print from, from making impressions on the paper.

The independent rotation of the type-wheels, as distinguished from type-wheels which must continuously and necessarily rotate together, is the principal feature of the invention of the second claim, and it is not a prerequisite to this independence of rotation that each wheel should be under the control of its own independent magnet. This is a feature of the Calahan machine, but it is not a part of the second claim. The claim requires that each type-wheel shall move or rotate by magnetic action independently of the other, and that it shall not be necessary to the movement of one that the other should at the same time be rotated also, and that a strip of paper and one impression-pad shall be moved up against the type-wheels by a magnet, so that impressions from the characters upon either or both wheels, may be made upon the strip of paper, and thus a message may be printed

exclusively from one wheel, or may be printed in two lines from the characters on both wheels,—that is, by the united or joint action of both wheels,—but it is not a requisite that this printing shall be done simultaneously.

The great contest in this case was in regard to the meaning of the word "jointly," the defendants insisting that it meant simultaneously, and the plaintiff insisting that it meant by united action, or acting in co-operation, and thus, that when there was occasion to use both letters and figures upon a single strip, as is usually the case in transmitting stock quotations, such printing could be done in two lines by the united or joint action of the two wheels. The latter is, in my opinion, the correct interpretation of the claim, for three reasons:

(1) The improvement, or the advance in the art, did not, in fact, consist in simultaneous printing. It did not remedy an existing evil, and was not the thing which the patentee apparently wanted to accomplish. (2) The patent does not mention simultaneous printing as a thing which the instrument was necessarily to do; it points out that the wheels were so arranged with reference to each other that they could be used on one strip of paper jointly or separately; that is, either or both could be used to make one message; and when both were used, the impression from the respective wheels formed different lines. The idea which the specification and the claim convey, is that the operator can use both wheels, and so a double-line message can be produced by their joint action, but there was no requirement that they must be used simultaneously. (3) While the Calahan instrument, before a unison device was added to it, had the capacity of simultaneous printing, such printing is not and was not supposed to be of practical value.

The defendants', or the Field, instrument has two wheels, one a figure wheel, and the other a letter wheel, on separate shafts, both controlled by magnetism, and each moving independently. The wheels print by their united action, in two lines, upon one strip of paper moved up by a press-pad, and can print by the use of either wheel separately. As in the Calahan machine, both wheels are provided with a blank space, which is turned towards the paper while the other wheel is being used to print from. The difference between the machine of the Calahan patent and the Field machine is that the latter has a device by which, after a wheel has ceased to print, it returns automatically to the zero point, and is locked there, before the other wheel can be rotated. In the opinion of the defendants, their machine is relieved from the charge of infringement because the wheels do not move independently and cannot print simultaneously. The latter suggestion is disposed of by the conclusion that the claim does not require such printing. The defendants say that their wheels do not move independently because it is a "condition of the rotation of one wheel that the other shall first be brought to a state of rest." This does not prevent independence of motion, in the sense in which Calahan used the term "independent." One wheel is not linked to the other so that both must rotate together, which is what he desired to avoid. Either wheel is rotated without thereby rotating or moving the other, a result which he desired to gain.

So far as is disclosed by the record, the allegation of infringement is sustained.

The next point is in regard to the duration of the Calahan patent, the defendants insisting that no injunction can issue, because the patent expired on March 16, 1885. William Edward Newton received, upon a communication from Elisha W. Andrews and Edward A. Calahan, an English patent for the Calahan invention, which was sealed on August 21, 1868, and dated March 16, 1868, the day on which the provisional specification, with the petition of Newton, was filed at the office of the commissioner of patents. The original United States patent to Calahan was dated April 21, 1868, and from the copy of the original patent which is in evidence it appears that the application must have been made as early as December 28, 1867.

The effect of the sixteenth section of the act of March 2, 1861, taken in connection with section 6 of the act of March 3, 1839, upon the duration of United States patents for an invention which had been previously patented abroad, had been frequently discussed, (*De Florez v. Reynolds*, 17 Blatchf. C. C. 436; S. C. 8 FED. REP. 434;) but I am not aware that it has been supposed that the sixth section of the act of 1839 related to patents which were issued by the United States before an English patent had been sealed and published. In this case the English patent was sealed five months after the patent in suit was issued, and although the English patent was, when published, dated March 16, 1868, I do not suppose that such date has any effect upon the life of the subsequently issued United States patent. It will also be noticed that the application for the United States patent was made before the provisional specification was filed in the office of the English commissioner of patents. The decision of Judges GRIER and KANE in *French v. Rogers*, 1 Fisher, Pat. Cas. 133, in 1851, was to the effect that a United States patent issued after the issue of the English patent, but applied for before the date of the application for the English patent, was not within the sixth section of the act of 1839. This point was left undecided by the supreme court in *O'Reilly v. Morse*, 15 How. 62, decided in 1853.

The second claim of the original Calahan patent was as follows:

"Two or more type-wheels separately controlled by magnetism, and arranged side by side, or with their axis on the same line, so as to be impressed jointly or separately on one strip of paper, substantially as and for the purposes set forth."

The second claim of the reissue does not enlarge the original claim; it is a more exact and more clearly defined statement of the invention than the original patent contained, but the original claim would probably have received the same construction.

There should be a decree for an injunction and an accounting. The terms of the decree will be settled upon hearing.

MORLEY SEWING-MACHINE Co. and others v. LANCASTER.

(Circuit Court, D. Massachusetts. March 5, 1885.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—MORLEY AND LANCASTER BUTTON-SEWING MACHINES.

Letters patent No. 236,350, granted to James H. Morley, on January 4, 1881, for improvements in button-sewing machines, construed, and held not infringed by the Lancaster machine.

2. SAME—CONSTRUCTION OF PATENT—RULE AS TO INFRINGEMENT.

When an invention is simply an improvement on a known machine by a mere change of form or combination of parts, the inventor is only entitled to the specific form of the device which he produces, and he cannot invoke the doctrine of equivalents to suppress other improvements which are not colorable invasions of his own. But where an inventor precedes all the rest, and his machine performs a function never performed by any earlier machine, the court will treat as infringers all who accomplish the same result by substantially the same or substantially equivalent means. In the one class of inventions slight differences may avoid infringement. In the other class, there must be substantial differences to escape such a charge.

In Equity.

B. F. Thurston and Ambrose Eastman, for complainants.

T. W. Clarke and Geo. E. Smith, for defendant.

COLT, J. The present case arises upon an alleged infringement of letters patent to James H. Morley, dated January 4, 1881, for improvements in button-sewing machines. The invention relates to the automatic mechanical sewing of buttons to a fabric, and, on the evidence before us, we think Morley may fairly lay claim to have invented the first practical machine for accomplishing this result. In view of the position taken by the learned counsel for complainants, based on the claim that Morley was a pioneer in the art, and his invention a primary one, it is necessary to clearly understand at the outset the legal scope of the Morley patent. For if, on the ground of primary invention, the patent covers every other automatic button-sewing machine, or every other button-sewing machine which makes use of the three groups of mechanism employed by Morley, no matter how radical the changes in the specific mechanism of those groups may be, then it is clear that the defendant's machine infringes, and we need go no further.

In his patent, after describing the machine, Morley declares that the same is only one of different mechanisms he has contemplated, which may be effectually employed for carrying out the main feature of his invention,—the automatic mechanical sewing of buttons to a fabric. But it is manifest that Morley cannot patent the principle of sewing buttons to a fabric automatically, any more than the idea of nailing boxes by machinery, when previously nails had been driven singly and by hand, could be patented. He could only patent the particular contrivance to make the idea practically useful, as the supreme court held in the nail case. *Wicke v. Ostrum*, 103 U. S. 461.

Nor do we see how the patent can be held to extend to every button-sewing machine which uses the three groups of instrumentalities employed by Morley, for this is to say that the Morley patent is in no way limited to the specific mechanism described in the specification, but embraces every form of mechanism which these several elements might assume. It is difficult to conceive of a button-sewing machine that is not made up of similar groups of mechanism. To attach a button to a fabric by machinery it would seem necessary to employ some form of button-feeding mechanism, sewing mechanism, and mechanism for feeding the fabric along. To hold broadly that the Morley machine covers every other button-sewing machine which adopts the use of these three groups of instrumentalities in combination, without regard to the specific mechanism employed, is to hold, in substance, that it covers all automatic button-sewing machines. It would, in effect, be another way of securing to Morley a monopoly of the principle of sewing buttons to a fabric by machinery. Morley's patent secures to him the exclusive right to the use of the mechanism described therein. It does not give him the exclusive right to a principle, or to groups of instrumentalities, independent of the mechanism employed.

The most the complainants can ask for, in view of the fact that the Morley invention is a primary one, is that the court should adopt a more liberal rule of construction than is usual in the case of secondary inventions, and thus recognize a principle first clearly laid down in *McCormick v. Talcott*, 20 How. 402. When an invention is simply an improvement on a known machine by a mere change of form or combination of parts, the inventor is only entitled to the specific form of device which he produces, and he cannot invoke the doctrine of equivalents to suppress other improvements which are not colorable invasions of his own. But where an inventor precedes all the rest, and his machine performs a function never performed by any earlier machine, the court will treat as infringers all who accomplish the same result by substantially the same, or substantially equivalent, means. In the one class of inventions slight differences may avoid infringement. In the other class, there must be substantial differences to escape such a charge.

The counsel for the complainants strenuously contend for the application of a broader rule of construction, in the case of a primary patent, than is here indicated. They maintain that the defendant, by adopting the three groups of instrumentalities which Morley uses, infringes, whether the specific mechanism of the two machines is substantially equivalent or not. We know of no case of a machine patent, primary or otherwise, which goes to this length. We do not think the cases cited by the complainants establish any broader rule than we have stated.

In *McCormick v. Talcott*, 20 How. 403, it was held that the patentee, being the original inventor of the device or machine called the

divider, he would have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations. In *Railway Co. v. Sayles*, 97 U. S. 554, the court held that the defendant did not infringe, because the patentee was only entitled to the specific form of car-brake which he produced. This was on the ground that the patentee had merely made an improvement in what was old. But in the course of the opinion the court say that if one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute.

In *Clough v. Barker*, 106 U. S. 166, S. C. 1 Sup. Ct. Rep. 188, it was decided that as Clough was the first person who applied a valve regulator to a burner, he was entitled, under the decisions heretofore made by the court, to hold as infringements all valve regulators which perform the same office in substantially the same way, and were known equivalents for his form of valve regulator. And in the two cases of the *Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co.*, 5 Sup. Ct. Rep. 513, just decided by the supreme court, the court hold that the defendant's safety-valve is substantially equivalent in construction and mode of operation to that described in the Richardson patents, on which suit was brought.

The complainants' citations of authorities on the construction of process patents are hardly in point, because if one uses the process described in the patent he may infringe though he employs a different apparatus. *Tilghman v. Proctor*, 102 U. S. 707.

In *American Bell Telephone Co. v. Dolbear*, 15 FED. REP. 448, it was held that the Bell patent embraced a process, and was not limited to any form of apparatus; and Justice GRAY said that, as the defendant used Bell's process, or method, it was not necessary to consider whether the defendant's apparatus was a substantial equivalent of the plaintiff's.

As a result of the foregoing inquiry it becomes necessary, in the consideration of this case, to compare the mechanism of the Morley machine with that used in the defendant's machine, to ascertain whether or not they are substantially equivalent. It has been observed that both machines embrace three main groups of instrumentalities,—mechanism for feeding the buttons to the machine, sewing mechanism for receiving and taking possession of the buttons in succession and securing them to the fabric, and mechanism for feeding the fabric along and thereby spacing the buttons at the required distance from each other. The button-feeding mechanism in the Morley machine consists, in substance, of a hopper for receiving the buttons. In this hopper there is a hopper-valve, which picks out the buttons one by one and delivers them into an inclined trough. The buttons enter this trough with their shanks turned in different directions. A corrugated strip of metal lying over the top of the trough, which

is oscillated by proper machinery, rolls the buttons over so that their shanks or eyes lie in the slot or groove at the bottom of the trough. The buttons slide down the trough. At the lower end of the trough there is a button-wheel provided with pockets, each capable of holding a button. The button-wheel rests on a stationary table, and when a button arrives over a notch in the table a plunger or punch descends into the pocket, and drives the button into what is termed a split-spring spoon. The spoon turns round on its axis 90 degrees, in order to bring the eye of the button into a horizontal position, so that it can be entered by the needle. The patent also describes a modified form of contrivance for bringing the buttons successively into position to permit the needle to pass through the eye of the button. In this modification the button-wheel is dispensed with, and a spring applied to the bottom of the trough, which holds the column of buttons in place. This spring, or spring-gate, is opened at intervals and shuts itself. Spring-nippers are used to transfer the button from the trough to the sewing mechanism. These spring-nippers open the gate at the bottom of the trough, receive and clamp the button, and turn it over 90 degrees, so that the shank may be in a horizontal position to be entered by the needle. In the defendant's machine the buttons are thrown into a hopper provided with a reciprocating brush, which forces the buttons into slits, with their bodies down and shanks up. These slits converge into a single slit. Just before reaching the end of the raceway the slit is twisted, so that the shanks of the buttons are presented in a horizontal position at the end of the raceway, ready for the needle to enter. The column of buttons is held up by a spring, or spring-gate, and this spring-gate is opened by the button itself, owing to the vibratory motion of the raceway. The thread passing through the eye of the lowest button, it is prevented from vibrating, but the button is pulled out, and in pulling out overcomes the resistance of the spring.

It thus appears that the defendant's machine has no hopper-valve, and no corrugated plate for turning the buttons over in the trough; but more important than this, it has no button-wheel, or table, or punch, or split-spring spoon, or spring-nippers, or any equivalents therefor. By presenting the button shank upwards in the raceway, or trough, and then twisting the slit in the raceway which holds the shanks, the Lancaster machine dispenses with all the mechanism in the Morley patent for bringing the buttons from the end of the trough to a position to be operated upon by the needle. We think an inspection and comparison of the button-feeding mechanisms of the two machines show them to be essentially different.

As to the sewing mechanism of the two machines we deem it unnecessary to enter into details. It is admitted by the complainants' expert, as it is apparent on inspection of the machines, that the stitching or sewing mechanism of the Lancaster machine is different from that shown or described in the Morley patent, and that the form of

stitch is different. Unless, therefore, the Morley patent covers all forms of sewing mechanism, or all forms in combination with button-feeding and cloth-feeding devices, there can be no infringement. The mechanism for feeding the fabric along and spacing the buttons is substantially the same in both machines. We do not understand that Morley claims that he invented this feed mechanism, or that it is new.

The complainants charge the defendant with infringement of the first, second, eighth, and thirteenth claims of the Morley patent, which are as follows:

(1) The combination in a machine for sewing shank-buttons to fabrics, of button-feeding mechanism, appliances for passing a thread through the eye of the buttons and locking the loop to the fabric, and feeding mechanism, substantially as set forth.

(2) The combination in a machine for sewing shank-buttons to fabrics, of a needle and operating mechanism, appliances for bringing the buttons successively to positions to permit the needle to pass through the eye of each button, and means for locking the loop of thread carried by the needle to secure the button to the fabric, substantially as set forth.

(8) The combination in a machine for sewing buttons to fabrics, of button-feeding and sewing appliances, substantially as set forth, and feeding appliances and operating mechanism, whereby the feeding devices are moved alternately different distances to alternate short button stitches, with long stitches between the buttons, as specified.

(13) The combination, with button-sewing appliances, of a trough, appliances for carrying the buttons successively from the trough to the sewing devices, and mechanism for operating said appliances and sewing devices, as set forth.

Holding that the Morley patent under the law is limited substantially to the mechanism set out and described therein, and having found that the button-feeding mechanism and the sewing mechanism of the Lancaster machine are not substantially the same as, or substantially the equivalent of, those in the Morley machine, it is clear that the defendant does not infringe any of the above claims. It follows that the bill must be dismissed; and it is so ordered.

GRAIN DRILL MANUF'RS Co. v. RUDE and others.

(Circuit Court, D. Indiana. January 24, 1885.)

PATENTS FOR INVENTIONS—GRAIN-DRILLS—CONSTRUCTION—INFRINGEMENT.

Letters patent No. 176,719, granted to J. M. Westcott, April 25, 1876; reissued patent No. 4,091, granted to Thomas and Mast, August 2, 1870; patent No. 66,578, granted to J. P. Fulgham; and reissued patent No. 6,274, granted to E. C. Patric, for improvements in grain-drills,—construed, and *held* not infringed.

In Equity.

Wood & Boyd, for complainants.

Stem & Peck and Mr. L. Hill, for defendants.

WOODS, J. The complainant is a corporation organized under the laws of Ohio, having its place of business at Dayton. The defendants are manufacturers, doing business at Liberty, Indiana. The original bill charged the infringement of letters patent No. 176,719, granted J. M. Westcott, April 25, 1876, for an improvement in grain-drills; letters patent No. 171,907, granted Edward Kuhns, January 4, 1876; reissued September 3, 1880, No. 9,066, and reissued letters patent No. 4,091, dated August 2, 1870, granted to Thomas and Mast, the original patent being dated August 3, 1869. These three patents cover the improvements in the seeding mechanism, and in what is called the "shifting-levers" used to throw the machine out of gear.

The defendants in their answer cited numerous anticipating devices, which they allege were the same in construction and mode of operation as the patented devices of complainant. The complainant, having obtained leave of court, filed its supplemental bill alleging the infringements of letters patent No. 66,578, granted J. P. Fulgham, July 9, 1867, for an improvement in grain-drills; also, letters patent No. 100,998, granted Fulgham, Davis, and Lawrence, March 22, 1870, and reissue No. 9,341, dated March 15, 1870, to the same parties; and reissue No. 6,274, granted C. E. Patric, February 2, 1875, the original patent being dated December 29, 1868. The patent to Edward Kuhns, and the last mentioned reissue to Fulgham and the Wayne County Agricultural Company, No. 9,341, have been withdrawn by the complainant.

The devices in controversy relate, first, to the method of constructing the seed-cup and seed-wheel, which is the subject-matter of the Westcott patent. The first mentioned patent, granted to Fulgham in 1867, is for a combined grass-seed and grain-drill. The first claim of reissue No. 4,091, and the first claim of the Patric reissue, (No. 6,274,) as well as the first claim of the Fulgham patent, (No. 100,998,) relate to improvements in shifting-levers. The reissue No. 4,091 relates to the conductors and swinging tubes embraced in the thirteenth, fourteenth, and fifteenth claims. These several patents, it was conceded in the argument, were duly assigned to the complainant before the commencement of the suit.

In view of the previous art, as shown in the record, my judgment is that the patents in question, in so far as they can be sustained at all, must be restricted to a narrow construction, practically excluding any claim of infringement on account of the use by defendants of alleged mechanical equivalents; and by this rule, as it seems to me, the bill is not sustained by the evidence, and should be dismissed.

Decree accordingly.

THE ARCHER.

(Circuit Court, S. D. New York. March 26, 1885.)

1. **BOTTOMRY BOND—MASTER APPEARING AS PART OWNER—REPAIRS AND SUPPLIES.**

The master of a vessel was also the registered owner, but another was the equitable owner. The vessel having met with disaster, the master executed a bottomry bond to secure advances for repairs and supplies. He was in communication by mail and telegraph with the equitable owner, and the latter was ready to provide funds. *Held*, that the holder of the bottomry bond, with knowledge of all the facts at the time he took it, could not recover; that the equitable owner should be regarded as the legal owner of the vessel; and that the master had no authority to execute the bond, but that, to the extent the bond represented supplies and repairs which the master could properly order, the holder should be subrogated to the liens therefor.

2. **SAME—AUTHORITY OF MASTER.**

A master can make a bottomry bond only abroad and from necessity. He has no power to do so if the owner can be consulted, or if he can borrow money on the credit of the owner.

Admiralty Appeal.

For opinion of BROWN, J., in district court, see 15 FED. REP. 276. *Theodore F. H. Meyer*, for libellant and appellee. *Robert D. Benedict*, of counsel.

Goodrich, Dedy & Platt, for claimant.

WALLACE, J. In October, 1877, the bark *Archer* sailed from Bremerhaven, bound for New York, but met with disaster and put back to Bremerhaven for repairs, reaching that port November 1st. Crossman, the master of the bark, applied to Meiners, who represented the late firm of F. Roters & Co., for assistance. Roters & Co. had been the consignees of the ship on former occasions. Crossman told Meiners that he could draw on New York for the disbursements, and Meiners told him that would be satisfactory, and to go on with the repairs. Crossman had surveys made and the repairs were proceeded with, and bills were sent to Meiners, who paid them, but after having paid some of the bills Meiners insisted upon a bottomry bond as a security for the advances made and to be made. Crossman demurred, but finally consented, and the bottomry bond on which the suit is brought was executed. The bond was given to one Addicks, but, in fact, Meiners was jointly interested in it with Addicks. It was conditioned for the payment of 21,371 marks, with 20 per cent. premium.

The important question in the case is whether Meiners and Addicks relied upon the authority of Crossman, as owner, in executing the bond, or whether they dealt with him as master only. Crossman had no beneficial interest in the ship. He had executed two mortgages: one covering three-fourths of the ship, which became due July 1, 1877, for \$3,000, and had not been paid, and another not then due, covering the whole ship, for \$7,000. These mortgages were held by the claimant, Harrison, and exceeded in amount the value of the ship. Harrison, however, had allowed Crossman to continue in possession after default in the \$3,000 mortgage under a register and ship's pa-

pers which represented him as sole owner. Although the legal title to three-fourths of the ship was in Harrison after default took place in the payment of the \$3,000, and although Crossman had no substantial interest in the other fourth, if Meiners and Addicks treated with him upon the faith of his apparent title, the decree of the district court should be affirmed. If, however, they understood that he had only a naked legal title, and did not assume to contract as owner, but only as master, different considerations arise.

The proofs warrant the conclusion that Crossman, after putting back to Bremerhaven, put himself in communication by mail with Harrison, and informed Meiners of the fact, and when he received a cablegram from Harrison authorizing him to draw on New York, at 60 days, for necessary funds, handed it to Meiners; that Meiners satisfied himself by telegram of Harrison's responsibility, and was aware that he was the person whom Crossman assumed to represent in ordering the repairs; that Meiners intended, until about the seventeenth of December, to make the advances necessary on the credit of Crossman's drafts on Harrison, but then conceived the scheme of making a profit out of the transaction by means of bottomry. Influenced by this motive he insisted upon a bottomry bond, and induced Addicks to co-operate, concealing from Crossman the fact that he had any interest in the bottomry except to the amount of his advances. Addicks offered to advance the necessary funds, and to overcome Crossman's objections to giving a bond with 20 per cent. premium, proposed to make the interest 25 or 30 per cent., and give the difference to Crossman. After the bond was executed, Meiners gave Crossman 400 marks as coming from Addicks as a commission or gratuity. The district judge, in his opinion, states that he could not doubt that Harrison "was known to Meiners and Addicks, at the time of the negotiation for the bond, to be in the position of beneficial owner, though not the legal owner." It seems equally clear that neither of them supposed that Crossman intended to contract as an owner, pledging his own ship, but understood that he was acting as a master who was obliged to make the best terms he could under the circumstances, and who could be induced to consent to bottomry by the payment of a commission. Quite conclusive evidence of this is found in the circumstance that in the recitals of the bond Crossman is represented as the master of the ship, and not as the owner.

It was held by the learned district judge that Crossman, as master, had no authority to execute the bottomry bond, but that the bond was valid because he was the legal owner at the time of executing it. The master can make a bottomry bond only abroad and from necessity. He has no power to do so if the owner can be consulted, or if he can borrow the money on the personal credit of the owner. Communication was practicable here, both by mail and by telegraph; yet Crossman did not consult with Harrison further than to ascertain that the latter was willing to provide the necessary funds. The court below

was clearly right in deciding that the bond could not be upheld as a valid contract of the master.

The learned district judge seems to have considered Crossman to be the owner because he appeared to be such on the ship's register, and Harrison was only a mortgagee. But Crossman had the title to but one-fourth of the vessel after default had been made in the \$3,000 mortgage (*Brown v. Bement*, 8 Johns. 76; *Butler v. Miller*, 1 N. Y. 496; *Burdick v. McVanner*, 2 Denio, 170,) and the ship's register was at best but *prima facie* evidence of Crossman's title as owner. *Myers v. Willis*, 17 C. B. 77; S. C. 18 C. B. 886; *Hibbs v. Ross*, L. R. 1 Q. B. 534; *Morgan's Assignees v. Shinn*, 15 Wall. 105; *Blanchard v. Fearing*, 1 Allen, 118.

Undoubtedly, by allowing Crossman to remain in possession of the ship and proceed on a voyage with his name in her register as owner, after Harrison's title to three-fourths had accrued, the latter authorized third parties to rely upon Crossman's apparent title as owner, and would be estopped from asserting his own rights as owner against any persons who might contract upon the faith of Crossman's title. But Meiners and Addicks had full notice that Harrison was the beneficial and therefore the equitable owner, and they understood that Crossman was not assuming to act in behalf of any interest or title of his own, but only as master; or, in other words, as an agent for an owner. No estoppel can arise in their favor. Their position is no different than it would be if they were asserting their bond against an ordinary owner, who had the legal title to the ship at the time of the bottomry. If the bottomry would not have been good against an ordinary owner, it is not good against one who occupied the relation of owner in the transaction within the contemplation of all the parties. Upon the equitable principles which prevail in courts of admiralty, the lien of the bond must be deemed subordinate to the rights of Harrison.

To the extent that Crossman, as master, had authority to represent Harrison as owner, and subject the ship to liens for necessary repairs and supplies, the bond should be sustained, and the libelants be deemed subrogated to the liens. In the language of STORY, J., in *The Packet*, 3 Mason, 255, 260, "it is not here, as in courts of common law, that the bond must be good in whole or not at all. So far as the money was properly advanced, it may be held to give a valid lien, and be dismissed as to the rest." The district court disallowed the premium upon the bond, but decreed for the principal, with ordinary interest. It appears that the repairs, to a considerable extent, were in excess of the necessities of the ship, one item being the entire new coppering of the ship. The bond can only be allowed to stand for such supplies and repairs as a master could properly order.

The decree of the district court must be reversed, with costs of the appeal, and a decree is ordered for the libellant for such sum as may be found due by a commissioner to whom it is referred to ascertain and report the amount due.

SHARON v. HILL.

(Circuit Court, D. California. March 9, 1885.)

CIRCUIT COURT—JURISDICTION—CITIZENSHIP—HOW PLEADED.

An averment in the introductory part of a bill that "W. S., of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this, his bill against S. A. H., of the city and county of San Francisco, state of California, and a citizen of the state of California," * * * is a sufficient averment of citizenship of the parties to give the United States circuit court jurisdiction.

In Equity.

W. H. L. Barnes, O. P. Evans, and Stewart & Herrin, for complainant.

Tyler & Tyler, D. S. Terry, George Flournoy, and Walter Levy, for defendant.

SAWYER, J., (*orally*.) Counsel for respondent makes the point that the allegation of the citizenship of the parties to this suit, in the introductory part of the bill, is insufficient in form to give this court jurisdiction of the cause. At the time the point was raised, I stated it to be my impression that the supreme court had decided that allegations in the same form sufficiently stated the jurisdictional facts, and upon examination of the authorities, I find that view to be correct. In the respect referred to, the allegation is in the form found in, probably, a majority of the bills filed in this court.

Even the authority which is cited, and so strongly relied on, by respondent's counsel, does not go to the extent claimed for it, but, on the contrary, inferentially at least, is an authority the other way. The case is *Jackson v. Ashton*, 8 Pet. 148, reported, also, in 11 Curt. 53. The opinion is very brief, and the facts are very briefly stated, in the head-note, which was drawn by Mr. Justice CURTIS himself, who is understood to limit his head-notes to a statement of the exact point decided. The head-note reads thus: "The citizenship of the parties was averred in the title of the bill, but not in the bill itself. Held, that the court had not jurisdiction." The defect was not in the sufficiency in form of the averment of citizenship, but that the averment was not made in the bill itself, but only in the title. The title is no part of the bill. The form was, "*Thomas Jackson, a citizen of the state of Virginia, William Goodwin Jackson, and Maria Congreve Jackson, citizens of Virginia, infants, by their father and next friend, the said Thomas Jackson, v. The Reverend William Ashton, a citizen of the state of Pennsylvania.*" The language is not, "*is a citizen,*" etc. Mr. Chief Justice MARSHALL, in deciding the case, says:

"The title or caption of the bill is no part of the bill, and does not remove the objection to the defects in the pleadings. The bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case. The only difficulty which could arise to the dismissal of the bill presents itself upon the statement 'that the defendant is of Philadelphia,' [without stating that he is a citizen of Philadelphia, or even a resident of Philadelphia.]

This, it might be answered, shows that he is a citizen of Pennsylvania. If this were a new question, the court might decide otherwise; but the decision of the court, in cases which have heretofore been before it, has been express upon the point; and the bill must be dismissed for want of jurisdiction."

There is, then, no intimation that the averment of citizenship is not sufficient *in form*; but the defect is that the averment is not in the bill, but simply in the caption or title of the bill itself, and it is upon that ground alone that it was held to be insufficient.

In *Curt. Eq. Prec.*, which is a standard authority in the United States, and was prepared to supplement Story's works on Equity Jurisprudence and Equity Pleadings, is set forth, upon page 4, a form of averment of citizenship to be used in a bill in equity, which is the same as that found in the bill under consideration. Curtis gives a form of introduction for various bills; and the form of introduction for a bill, in the *United States circuit court*, is set forth as follows:

"To the judges of the circuit court of the United States, for the district of * * *, A. B., of * * *, and a citizen of the state of * * *, brings this, his bill, against C. D., of * * *, and a citizen of the state of * * *, and thereupon your orator complains and says," etc.

That is the form given by Curtis; and the introductory part of the bill, in this case, is in the same words, the blanks being filled as follows:

"To the honorable, the judges of the circuit court of the United States, ninth circuit, district of California: William Sharon, of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this, his bill, against Sarah Althea Hill, of the city and county of San Francisco, state of California, and a citizen of the state of California; and thereupon your orator complains and says:"

The form adopted in this bill is undoubtedly taken, either from the form given by Curtis, before referred to, or from the form prescribed by the rule of the supreme court of the United States. Equity rule 20 provides that—

"Every bill in the introductory part thereof shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form in substance shall be as follows:"

If the blanks are filled in with the names, places of abode, and citizenship of the parties to the bill, in the present case, the form set out in the rule will then read as follows:

"To the judges of the circuit court of the United States, for the district of California: William Sharon, of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this, his bill, against Sarah Althea Hill, of the city and county of San Francisco, state of California, and a citizen of the state of California. And thereupon your orator complains and says that," etc.

It is, then, apparent that the form of the introductory part of this bill must have been copied, either from this rule of the supreme court, or from Curtis' *Equity Precedents*, in both of which the form is in exactly the same language, word for word. I intimated to counsel, upon

the argument, that I was confident that the supreme court had ruled directly upon the point here involved, and such proves to be the fact. The decision which I had in my mind was in the case of *Jones v. Andrews*, 10 Wall. 327. In the statement of the case (page 329) appears the following:

"The suit was entitled at the beginning, *Stephen M. Jones, citizen and resident of Richmond county, Georgia, v. Joseph Andrews, citizen and resident of city and county and state of New York; P. Reed and W. H. Bryson, both citizens and residents of Shelby county, Tennessee.*"

That appears in the title or caption only, and not in any part of the body of the bill. Then in the prayer of the bill appeared this language:

"The premises considered, complainant prays that Joseph Andrews, a resident and citizen of the city, county, and state of New York"—

Which is the form of expression adopted in the bill in the case under consideration—not "*who is a citizen*;" and this appears in the *prayer* of the bill in the case cited, and not in the body of the bill, either in the introductory part or elsewhere, where one would look for a traversable allegation. Yet the supreme court held it to be a sufficient averment of the citizenship of the party to give the circuit court jurisdiction of the suit. Mr. Justice BRADLEY, delivering the opinion of the court, says:

"On the question of jurisdiction over the parties, the appellees contend (1) that the citizenship of the parties was not sufficiently alleged in the bill. * * * Although the allegation of citizenship is not made in precise and technical form, we consider it sufficiently explicit to sustain the jurisdiction of the court, if the citizenship disclosed by the allegation does not displace that jurisdiction. It is more explicit than the allegation in the case of *Express Co. v. Kountze Bros.* 8 Wall. 342, which was sustained by the court. All that is necessary is that it fairly appear by the bill of what states the respective parties are citizens. In this case, the form of the allegation leaves no room for reasonable doubt."

The prayer of the bill in the case cited names the defendants Reed and Bryson, "both of whom were residents [not citizens] of Shelby county, in the state of Tennessee," while the other respondent is referred to, as above stated, as "Joseph Andrews, a resident and citizen [not "*who is a resident and citizen*"] of the city, county, and state of New York," in precisely the same form adopted in the introductory part of the bill in this case. The omission of the words "*who is*," which would make an explicit allegation, is simply one of those ellipses which are so common to, and admissible in, the English language. Any ordinary person, possessing a fair understanding of the language, upon reading the statement, "William Sharon, of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this, his bill," etc., would understand it to be an averment that William Sharon is a citizen of the state of Nevada. It is a common form of expression, and no one could be misled as to the fact that this was intended to be stated; and the supreme court, in the case cited, has held it to

be a sufficiently explicit averment of the fact of citizenship, even where the expression appears in the prayer only, and not in any portion of the body of the bill.

The objection to the jurisdiction is therefore overruled.

HACK and others v. CHICAGO & G. S. Ry. Co. and others.

(Circuit Court, D. Indiana. 1885.)

1. REMOVAL OF CAUSE—DENIAL OF MOTIONS TO BE MADE PARTY AND TO REMOVE CAUSE.

If one who is a necessary party to a cause in a state court is wrongfully excluded, and denied leave to file a proper cross-bill and answer, and to present a motion and bond for removal of the cause to the federal court, he will be treated by the latter court as if a party, and the motion for removal determined accordingly.

2. SAME—SEPARATE CONTROVERSY—NOMINAL PARTY—REFUSAL OF TRUSTEE TO ACT.

If the owner of bonds, secured by trust deed or mortgage, has been let in as party to a cause concerning the trust property, and as such has a separate controversy with citizens of another state, his right to remove the cause to the federal court is not affected by the citizenship of the trustee named in the mortgage deed, who is not a party in fact, and had refused to move to be made party, or otherwise to execute the trust. If brought in, such trustee would be only a nominal party.

Motion of Henry H. Porter to have the court docket and take jurisdiction of case.

The objections made to the motion are, in substance,—

(1) That the same motion was made before and overruled; (2) that Porter was not a party, either plaintiff or defendant, in the state court, and therefore had no right, under the second section of the act of March 3, 1875, to apply for a removal of the cause from the state court to the federal court; (3) that, considered as a party to the suit, Porter has no controversy "which is wholly between citizens of different states, and which can be fully determined as between them;" (4) that the alleged refusal of John C. New, trustee of mortgage bonds of which Porter claims to be owner, to become a party to the cause was collusively made, in order to enable Porter to come into the case and procure the removal of it to the federal court.

The facts of the case are, in substance, these:

In the original case, commenced in Jasper county, and taken thence by change of venue to the Newton circuit court, the plaintiffs, Hack and others, claiming to be creditors of the Chicago & Great Southern Railway Company, and that that company was threatened with insolvency, and with numerous suits in different courts, prayed an accounting and an adjustment of the demand of all creditors who should come in, and of their respective priorities, and that a receiver be appointed to conserve and keep the road in operation for the benefit of the creditors. The receiver was appointed, and is in possession. The complaint upon which this appointment was made, makes mention of the first mortgage or trust deed of the property, but the trustee named in that deed, John C. New, shown to be a resident and citizen of Indiana, was not made a party. Early in March, 1885, Porter, claiming to be sole owner of

all bonds issued under and secured by that mortgage, made application to the Newton circuit court, then in session, to be admitted as a party in the cause, and for leave to file an answer and cross-bill; and, upon a denial of this motion, on the same day or the next, renewed the motion, and at the same time presented a motion and proper bond for a removal of the cause to this court, and these motions having been also denied, he procured and presented a transcript and moved this court to take jurisdiction. It then appearing that the application to be made a party in the state court did not show a refusal by New, the trustee, to act in the premises, this court considered the application defective, and refused to docket the cause. Thereupon an amended motion, showing New's refusal to take any step whatever in the further execution of the trust, was prepared, and, as is shown by the affidavits set out in the record now offered, was presented in the Newton circuit court then yet in session, on the thirteenth ult., and at the same time an answer and cross-bill, and petition and bond for removal.

These petitions and the cross-bill, before presentation to the judge of the court, had each been sworn to in open session by Mr. Porter, before the clerk of that court. The court at that time was presided over by a judge *pro tempore*, who, being of counsel in this cause, declined on that account to entertain the motions, or to note or permit the filing of the papers, though all objection to his acting was waived at the time by Porter's attorney. Thereupon communication was had with the regular judge of the court, who was then in Chicago, and his promise obtained to be in attendance at the court the next day, which by law was the last day of the term. On the afternoon of that day, Saturday, March 14th, the presiding judge, in order that the court might remain open until the regular judge should return, made no adjourning order, but upon the general order-book of the court signed an entry reading in this wise: "This record read this far, and signed this fourteenth day of March, 1885;" and thereupon left the bench and took train for his home at Monticello. Two hours thereafter—at 4 o'clock—the clerk entered upon the probate order-book, over the signature of the *pro tempore* judge, a journal order of adjournment of the court until court in course. Otherwise than this, it does not appear that any formal declaration of adjournment or attempt to adjourn was made. At or near 4 o'clock P. M., the regular judge arrived at Kentland, and went to the clerk's office, and thence to the office of the county recorder, where he was found by Mr. Pierce, attorney for Porter, and Mr. Wiley, who was also waiting for his action upon the bench in certain matters pending. In answer to a request to go to the court-room, he said that the court, as he was informed, had been finally adjourned; and upon being then told just what the judge presiding had done, and what entries had been made upon the dockets, he again peremptorily declined to go to the court-room and take the bench, saying, as the showing is, "that he believed the best thing he could do was to stay away from there." Thereafter, at a later hour of the same day, Porter filed with the clerk his application to become a party to the cause, his proffered answer and cross-bill, and his petition and bond for the removal of the cause; and, having procured a transcript, now again moves this court to assert jurisdiction.

In respect to the citizenship of the parties and persons concerned, it is shown that Porter is a citizen of Illinois, and that Hack and others, the plaintiffs, and the railroad company, defendant in the original cause in the state court, are citizens of Indiana. Before the present petitions to be made party and to remove the cause had been filed in the state court, an additional claimant, a citizen of Illinois, came into the cause, seeking as a plaintiff to share the benefits of the suit. New, the trustee in Porter's mortgage or trust deed, is a citizen of Indiana. In his proposed cross-bill, and in his petitions to be made party and to remove the cause, Porter shows that he is sole owner of 1,200 bonds for \$1,000 each, made by the defendant railway company and secured by a trust

deed, a copy of which is exhibited, containing the usual provisions of such instruments, and constituting a first lien upon the property, franchises, and income of the company and its road; that no other bonds were issued or outstanding secured by said deed of trust; that the company is totally insolvent; that default had been made in payment of interest due, and that the trustee had brought an action for foreclosure in the Newton circuit court; that, upon consideration of a demurrer to the complaint of the trustee, the court intimated a ruling to the effect that the trustee alone had no right to maintain the suit, and that thereupon said New dismissed his action and has since refused to bring any action or to come into this case, or take other steps of any kind for the enforcement of his trust, though thereunto especially requested. Porter's proposed answer was the general denial.

R. B. F. Pierce and McDonald, Butler & Mason, for Porter.

John S. Cooper and U. Z. Wiley, contra.

WOODS, J. Upon the showing made, it is too clear—as it seems to me—to admit of dispute that Porter was entitled to be made a party defendant; and, having been wrongfully denied that right, he should, in respect to the question of removal, be deemed to be a party. The case in this respect is very like one decided by Judges DAVIS and TREAT in the circuit court of the United States for the Southern district of Illinois. That decision was not reported officially, but in a note upon pages 42 and 43 of Dillon's Removal of Causes, is given a statement of it which, as has been shown at this hearing, is authentic and accurate. The present case is stronger than that, because in that the application to become a party was made to the judge in vacation, while in this it was made to the court in open session, and to the judge of the court at the county seat during the term allotted by law and before the court had been adjourned. There is certainly no good reason apparent in the record why the presiding judge should not have permitted the papers to be filed. If a judge be interested in a cause pending in his own court, he must make the formal entries or orders necessary to put the case in a way to be determined; and a refusal to do so, under ordinary circumstances, is equivalent to an active interference to the injury of the adverse party. The essential wrong in this case, however, was the refusal of the regular judge to go upon the bench and give a hearing upon the proposed motions. The court in contemplation of law was open, or at least capable of being opened. The judge presiding had not adjourned it; the clerk and sheriff, so far as appears, had not attempted to adjourn it. The judge having been present on that day, they had no power under the statute to declare an adjournment. Rev. St. 1881, §§ 1381, 1382.

The entry made by the clerk upon the probate order-book, it seems to me, is not material to be considered; and even if a formal adjournment had been declared, entered of record, and signed by the regular judge, it could not well be held, I think, that the order might not have been disregarded or vacated, and other business done in the court upon the same or even upon a succeeding day, if within the lawful term of the court. Mere inconvenience would seem to forbid a different rule, and there is apparently no insuperable, or even strong,

reason against this view. The question, however, does not now arise. In this case the power to hear clearly remained; its exercise was seasonably and properly invoked; and under the decision referred to, the authority of which is not now and here, at least, to be disputed, it must be held that Porter acquired such standing in court, or in the case at least, as to enable him to claim a removal. It may be that if the motion to be made party had been heard and overruled, the remedy might and ought to have been sought in an appeal to the supreme court of the state, and thence, if necessary, to the federal supreme court, though it is not clear how a case could be so presented, on appeal from the overruling of a motion to become a party, as to present also the question of right of removal. Upon this record, however, the court is not required to review any decision or ruling of the state court upon a matter brought within its jurisdiction, but only to give effect to its refusal, without apparent excuse, to receive and pass upon the motion when rightfully presented.

The other objections made to the removal are all, as I think, untenable. They turn upon the relation to the case of New, the trustee. He is not in fact a party. He refused to become a party of his own motion. By reason of this, Porter became entitled to be made a party in his own right. He could not bring New into the case with him,—that is not the office of a cross-bill,—and if upon consideration the court should order New to be made a party, his relation to the case would, as it seems to me, be so entirely nominal as not to affect the jurisdiction. The case of *Thayer v. Life Ass'n*, 112 U. S. 717, S. C. 5 Sup. Ct. Rep. 355, is cited in support of the opposite view; but in that case the trustee was proceeding to sell the trust property, and the action being to restrain him from making the sale, he was of course held to be an indispensable party. If New were brought into the case, it is to be presumed that he would persist in his refusal to act under the trust, and if he did this, it is clear that his relation to the case would be purely nominal and of no significance. If necessary, the court might, and of course would, appoint another to exercise the powers conferred by the trust deeds.

It is claimed, however, that the refusal of New to apply to be made a party was for the collusive purpose solely of enabling Porter to come in and remove the cause. Without going into details, it is enough to say that it was in the power and apparent duty of the complainants to have made New a party to the original bill; they chose not to do it; and upon the entire record and proof made, the alleged collusion for the purpose of obtaining a removal is not manifest. To say the least, the justification for seeking a removal is so manifestly strong that the court is not called upon to make a minute search for grounds upon which to base a refusal of jurisdiction.

That there are controversies in the case between Porter, as a citizen of one state, and citizens of other states is sufficiently clear. Upon his cross-bill he has a controversy with the defendant railway com-

pany, and upon his cross-bill and answer he has separate controversies with that company and the original complainants. Each of these controversies is between, and may be wholly determined between, citizens of different states. Indeed, each claimant in the original bill,—and there are three of them,—and each additional claimant who has or may come in under that bill, has a separate claim which Porter does or may contest; and the controversy so raised is clearly separable, and determinable wholly between him and the particular claimant as if there were no other parties to the record. And one of the claimants in the case is, as I understood it to be stated and conceded upon the argument, a citizen of the state of Michigan; and as against him, even if New were an actual and willing party and ranged upon the same side of the case with Porter, there would be, in this view, a proper controversy upon which the application for removal could stand. This would certainly be so, unless the railway company should be deemed a necessary party to such controversy. This question, however, need not be decided.

It follows that the transcript and other papers offered should be filed, and the cause docketed here as properly removed.

Ordered accordingly.

STEBBINS v. MORRIS and others.

(*Circuit Court, N. D. New York. March 22, 1885.*)

TRUST—PAYMENT OF PURCHASE MONEY FOR LAND, AND TITLE TAKEN IN NAME OF THIRD PARTY—REV. ST. N. Y. §§ 51, 52.

M., D., W., and K. entered into a verbal agreement to purchase from J., for their joint benefit, certain land, each of them to advance one-fourth of the purchase money, and the title to be taken in the name of K. The money was advanced, the land purchased, and an absolute deed executed to K., who immediately delivered to M., D., and W. a written memorandum acknowledging the receipt of the purchase money, and that each of the co-purchasers was the joint owner of one-fourth part of the land. K. became insolvent, and made an assignment to V., and V. assigned and deeded to S., as assignee in bankruptcy of K., all of the property assigned to him. S. sold the land under order of the court. *Held*, that the purchaser at such sale acquired a good title as against M., D., and W.

In Equity.

Hale & Bulkley, for plaintiff.

F. Fish and John M. Carroll, for defendant.

WALLACE, J. This action was brought in the supreme court of the state of New York, and was removed to this court upon the petition of the plaintiff. It is a partition suit, brought under the provisions of the Code of Procedure, and the defendants are made parties as claiming an adverse interest to the plaintiff in the real estate sought to be partitioned. The defendant Cornelius Kline has the legal title

to one undivided fourth part of the real estate. The suit involves the rights of the other parties to three undivided one-fourth parts of certain real estate conveyed April 1, 1870, by one Jackson to James W. Kline. Kline was adjudged a bankrupt upon the petition of his creditors filed on the twenty-ninth day of August, 1878, in the United States district court for the Northern district of New York, and one Vandenburg was subsequently appointed his assignee. On the twenty-fourth day of September, 1881, the said Vandenburg as such assignee, pursuant to the direction and order of the court in bankruptcy, sold and conveyed by deed to the plaintiff all the estate, title, and interest of said Kline in said real estate vested in said assignee. Within three months of the filing of the petition in bankruptcy, Kline had made a general assignment of all his property for the benefit of creditors to one Stewart; and on the twenty-seventh day of December, 1878, Stewart, by deed, granted, conveyed, and released to Vandenburg, as assignee of Kline in bankruptcy, all the real estate which was transferred to him by Kline under the general assignment.

Whether Vandenburg, as assignee of Kline in bankruptcy, acquired Kline's interest by a title superior to Stewart's, or acquired it by the deed of release from Stewart, is not material. The title was in him at the time of the sale under the order of the court, and the plaintiff acquired any title that the assignee could convey. It follows that the plaintiff had the legal title at the time of the commencement of the suit to the three undivided fourth parts of the land in question. The defendants claim to be the equitable owners of the three undivided fourth parts of the land, and insist that the plaintiff's legal title is subordinate to their equitable title because the plaintiff is chargeable with notice of their equities. Their equitable title arises out of the following facts: On or before April 1, 1870, Morris, De Wolf, McDonnell, and Kline entered into a verbal agreement to purchase for their joint benefit of Jackson the land in controversy. By this agreement each of them was to advance one-fourth of the purchase money to pay for the land, and the title was to be taken in the name of Kline. The money was accordingly advanced, and on the first day of April, 1870, a deed was executed by Jackson to Kline, in which Kline was named sole grantee. The deed did not express any trust in behalf of the co-purchasers. Immediately after receiving the deed, and on the same day, Kline delivered to each of the co-purchasers a memorandum in writing, whereby he acknowledged the receipt of the purchase money, and that each of the co-purchasers was the joint owner of one-fourth part of the real estate. Kline subsequently mortgaged an undivided fourth part of the land. The title remained in him as sole owner until he became insolvent and made the general assignment to Stewart.

Upon these facts it must be held that the defendants who claim under Morris, McDonnell, and De Wolf have no equitable title. If the agreement between Kline and the other co-purchasers had been

made after he acquired title from Jackson, or if the deed from Jackson had not been executed directly to Kline pursuant to the agreement between the co-purchasers, there would be no difficulty in maintaining that all the co-purchasers acquired an equitable title by virtue of the transaction between themselves. But the transaction is directly within the operation of those sections of the Revised Statutes of the state relating to uses and trusts, which are as follows:

"Sec. 51. Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.

"Sec. 52. Every such conveyance shall be presumed fraudulent as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intention is not disproved a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands."

The meaning and effect of these provisions was considered by the court of appeals in *Garfield v. Hatmaker*, 15 N. Y. 475, and it was held that where a grant for a valuable consideration is made to one person, and the consideration therefor is paid by another, no interest, legal or equitable, vests in the person paying the consideration, but the statute imposes upon the legal estate in the hands of the grantor a pure trust in favor of the creditors at the time of the person paying the consideration, which can be enforced in equity only. As stated in the opinion of BROWN, J., "the plain and obvious import of the language of the sections is to destroy the trust or use which, but for the statute, would have resulted to the person paying the consideration as a legal consequence of the act;" and, in the language of COMSTOCK, J., (page 478,) "the person paying the consideration money must take the conveyance to himself or he can have no legal or equitable interests in the land." In *Everett v. Everett*, 48 N. Y. 218, such was held to be the legal consequence of the conveyance, although the deed was delivered to and retained by the person who paid the consideration. The object of the statute was to prevent secret frauds by imposing the penalty of forfeiture of the estate upon parties who thus conceal their real ownership under the name of another person. *Siemon v. Schurck*, 29 N. Y. 610. Doubtless, in the transaction here, there was no fraudulent purpose in the minds of the parties to it. The effect was, however, by investing Kline with the ostensible title, to give him credit, and produce just such consequences as the statute was intended to prevent. The written memorandum delivered by Kline cannot be treated as a contract to convey made after he acquired title. It was evidence merely of the original transaction.

A decree will be entered for a partition and sale, and establishing the rights of the parties according to this opinion.

QUINN v. NEW JERSEY LIGHTERAGE CO.

*(Circuit Court, E. D. New York. April 2, 1885.)***MASTER AND SERVANT—INJURY TO EMPLOYE—NEGLIGENCE OF VICE-PRINCIPAL WHILE ACTING AS CO-EMPLOYEE.**

An employer is not liable to an employe for the negligence of a vice-principal in doing the duty of a co-employe of the person injured.

Motion for New Trial.

Chas. J. Patterson, for complainant.

Benedict, Taft & Benedict, for defendant.

WALLACE, J. The plaintiff was injured by the negligence of the captain of a barge, owned by the defendant, while engaged in loading the barge with iron rails. The captain at the time was assisting the plaintiff and other employes in the work. In loading the rails, two men worked on the hand-winch, one hooked the tongs upon the rails, and two pushed and guided the rails into the barge, when they were raised by the men at the winch; and it was the duty of the man at the tongs to give the order to hoist to the men at the winch when the tongs were properly hooked. Prior to the accident, one Lee had been at the tongs, and the captain had been helping one of the men at the winch. At the time of the accident, the captain was at the tongs, and the plaintiff was one of the men to guide the rails. The captain gave the order to hoist prematurely, and the rail fell upon the plaintiff, inflicting the injuries for which his suit was brought.

Upon the trial the judge instructed the jury that the negligence of the captain was the negligence of the defendant, and the motion for a new trial raises the question whether that instruction was correct. Stated in other terms, the question is whether an employer is liable to an employe for the negligence of a vice-principal in doing the duty of a co-employe of the person injured.

It was assumed at the trial that the recent case of *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, S. C. 5 Sup. Ct. Rep. 184, was an adjudication in point which is controlling in this court, and the instructions to the jury were given in consequence. The only question in that case was whether the corporation defendant was liable to an engineer managing the locomotive of a freight train who was injured in consequence of the neglect of a conductor of the train to communicate instructions to the engineer essential to the safety of the train; the conductor, by the regulations of the corporation, being in control of the train and of all employes on it, and responsible for all its movements. The court held that the conductor did not occupy the position of a co-employe with the engineer. Mr. Justice BRADLEY, delivering the opinion, used this language:

"A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the

personal representative of the corporation, for whose negligence it is responsible to subordinate servants."

The case turned upon this point, and it having been ruled against the defendant it was not necessary to decide any other question. The conductor was charged with the duty of giving instructions, in the absence of which the engineer could not perform his duties intelligently, or protect himself or his employes from danger. The engineer was injured in consequence of the conductor's failure to perform this duty. As he was not a co-employee of the engineer, the risk of the conductor's negligence was not among those incident to the employment which the engineer impliedly assumed when he engaged in the service of the corporation.

The decision is of marked significance, because it departs from the rule established by the courts in England, New York, and Massachusetts, and other courts, that all those are fellow-servants who are engaged in a common object in the business of the employer, whether they are of the same grade of authority or not. The doctrine of these authorities is that all the employes of the same employer, engaged in carrying forward the same general enterprise, although in different departments and in different ranks of supremacy, are co-employees, who, by the implied terms of their employment, assume towards the employer the risks arising from the negligence of any of their number. The *Ross Case*, on the other hand, is in line with *Cowles v. Richmond, etc., R. Co.* 84 N. C. 309; *Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205; *Whalen v. Centenary Church*, 62 Mo. 326; and decisions in Ohio and Kentucky cited in the opinion.

The case does not touch the question here, which is, not whether the defendant is liable to a subordinate employe for the negligent act of the captain in the discharge of his duty, but whether the defendant is liable for the negligence of the captain, not as captain, but as a subordinate employe. The solution of this question depends upon the implied obligation assumed by an employer to his servant. Unless there is a breach of that obligation there is no negligence. Briefly stated, this obligation is that the employer will not expose the servant to any unreasonable hazards, in view of the nature of the services to be performed. As to those things which are to be done by the employer personally he undertakes not to be negligent. As to those things which he is not to do personally he undertakes to use due care to see that they are properly done; and as incidents of this obligation he is to use due care to provide safe appliances and facilities for the servant in the service to be performed, and to employ competent fellow-servants to assist him, if fellow-servants are required. Those things which are to be done by the employer personally are employer's duties, and if he delegates them to others he undertakes for their proper discharge precisely as though he personally were to discharge them.

Conversely, the servant who engages in the employment of another

for the performance of specified duties, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, his compensation is adjusted accordingly. Among these risks are those arising from the carelessness and negligence of fellow-servants; because these are risks which are incident to the service, and he can as effectually guard against them as the employer. This has been deemed to be the law by all the authorities, beginning in England with *Priestley v. Fowler*, 3 Mees. & W. 1, and in this country with *Murray v. South Carolina R. Co.* 1 McMul. 385, and *Farwell v. Boston & W. R. Co.* 4 Metc. 49; and the doctrine is reiterated in *Hough v. Railway Co.* 100 U. S. 213.

If it is within the contemplation of both the employer and employe that when the former fully discharges his duty of preparation and general supervision for the particular service, all other incidental risks are assumed by the latter, and are included in his compensation, it follows logically that the employe can only allege negligence when the employer has failed, either in person or by his agents, efficiently to discharge his duty. If an employer does not undertake responsibility to a servant for the acts which are ordinarily to be performed in the service by a co-servant, there is no reason why he should be held liable for the negligent performance of those acts. And if the duty negligently performed is not the master's duty, but a servant's duty, the servant injured has no right to complain unless the employer was negligent in selecting the co-servant.

The distinction between the acts of negligence for which the master is liable, and those of which the employe assumes the risks, is well stated in *Davis v. Central Vermont R. Co.* 45 Amer. Rep. 593, S. C. 55 Vt. 84, as follows:

"The rule of law which exempts the master from responsibility to the servants for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one, the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other, he may."

The true inquiry in this case is whether the character of the act of the captain was one which it was incumbent upon the defendant to see properly performed. This is the rule of *Crispin v. Babbitt*, 81

N. Y. 516, where it was held that the liability of a master for an injury to an employe, occasioned by the negligence of another employe, does not depend on the grade or rank of the latter, but upon the character of the act, in the performance of which the injury arises. In that case, the plaintiff was injured by the act of the manager and superintendent of defendant's factory, who carelessly started a wheel while the plaintiff was occupied with the machinery. The court below refused to charge that this was the act of an operative for which the defendant was not liable, and the court of appeals held this refusal to be error and reversed the judgment. RAPALLO, J., delivering the opinion of the court, approved the language of CHURCH, C. J., in *Flike's Case*, 53 N. Y. 549, as follows:

"The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. It is as to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

This was also held in *Hoke v. St. Louis, etc., R. Co.* 11 Mo. App. 574, where it was determined that where a road-master of a railroad company, having superintendence of the road department, was negligent in an act which he assumed to do as a mere boss of a gang, and a workman was injured, the company was not liable as for the negligence of a vice-principal. The court used this language:

"But just as the tortious act of a servant to make the employer liable must pertain to the particular duties of that employment, so the wrongful act of a vice-principal or *alter ego* must be an act done by him as vice-principal. The fact that he is vice-principal in one department of the business does not make all his acts the acts of a vice-principal."

Applying the rule to the present case, where the captain of the barge was not performing a captain's duty while working at the tongs, but that of a common laborer, his negligence was not that of a vice-principal but of a co-laborer. If he had directed any of the men assisting the plaintiff to do that particular part of the work which he undertook to do himself, as he might have done if he had seen fit, and the plaintiff had been injured by the fault of the one thus selected, the defendant would not have been liable, in the absence of proof that the captain had selected an incompetent man for the place. The plaintiff has no more ground of complaint than he would have had if he had been injured by the carelessness of any of his fellow-laborers. It was the act of a co-servant, and among the risks incident to the employment which the plaintiff impliedly assumed when he engaged in the work. The captain exercised no more control over him than did the other laborers.

A new trial is therefore ordered.

THREE THOUSAND EIGHT HUNDRED AND EIGHTY BOXES OF OPIUM v. UNITED STATES.

(Circuit Court, D. California. September 20, 1883.)

1. CUSTOMS DUTIES—SMUGGLING—EVIDENCE—DECLARATIONS OF STEWARD OF SHIP.

Declarations of the steward of a ship, on which it is claimed certain opium was smuggled, made to the officers seizing such opium an hour after the seizure, but while the opium was in their possession near the place of seizure, waiting to be transported, *held* admissible, in an action to condemn such opium, as part of the *res geste*, though not made in the presence of, or by authority or with the knowledge of, the claimant.

2. SAME—LETTERS OF THIRD PARTIES.

A letter written by a third party, whom the evidence tended to implicate, to other parties in China two months after the seizure, apparently referring to the transaction, and left by the writer with the claimant, who added a paragraph thereto, also seemingly referring to the transaction, and a letter written by a Chinaman to another Chinaman in China, supposed to refer to passages in the other letter, both letters being put in the same envelope, and directed and mailed to the party in China, also *held* admissible.

3. SAME—PROBABLE CAUSE—REV. ST. § 909—BURDEN OF PROOF.

When the evidence is sufficient to show probable cause, in cases of information to condemn smuggled goods, the burden of proof is on the claimant to show the innocence of the transaction.

4. SAME—PREPONDERANCE OF EVIDENCE—PROOF BEYOND REASONABLE DOUBT—FORFEITURE OF GOODS.

A mere preponderance of evidence, in a case by information to condemn smuggled goods, in favor of the guilt of the transaction, will justify a decree of forfeiture.

Information *in rem* to Condemn Smuggled Opium.

Philip Teare, U. S. Atty., and *A. P. Van Duzer*, Asst. U. S. Atty., for libellant.

W. H. L. Barnes and *George W. Towle, Jr.*, for claimant.

SAWYER, J. This is an appeal from the decree of the district court, condemning the opium in question, on the ground that it had been smuggled into the port of San Francisco. The record from the district court contains nearly 1,700 pages of legal cap, and nearly 800 pages additional testimony have been taken in this court. The case was argued orally, and submitted a long time ago, the argument occupying 13 days, with leave to file printed briefs, the last of which was filed March 10, 1883.

Owing to a large number of cases having precedence, and the large record to examine, it was impossible to properly take the case up before the summer vacation, or to dispose of it till now. The large amount of new testimony taken in this court is upon the points wherein the district court held the evidence to be deficient, and is additional to, and not as has been claimed in conflict with, the claimant's case as made in the district court; and it is of such a character as to require a thorough and careful re-examination of the entire case, and such examination has been given to it. The following

facts, when stated as facts, are satisfactorily shown by the evidence. On doubtful points the substance of the testimony is stated:

On the night of January 3-4, 1882, the steam-ship City of Tokio was lying at the outer end of the Pacific Mail Steam-ship Company's wharf, extending from the foot of First street, in the city of San Francisco, into the bay in a southerly direction on the easterly side of the wharf. She had arrived from Hong Kong, China, and been docked on December 25, 1881, or nine days previously. The steam-ship City of Sydney was at the same time lying at the same wharf on the westerly side, directly opposite the City of Tokio. The City of Sydney runs between San Francisco and Australia, stopping each way at Honolulu, in the Sandwich islands. She was, at the time, advertised to leave for Australia on January 14, 1882, or 10 days later. A few minutes after midnight, not to exceed from 5 to 15 minutes, police officers Egan and Smith, patrolling the harbor, were going down the bay in a boat from Folsom-street wharf towards the Pacific Mail wharf, and when a short distance from the end of Beale-street wharf, at about the point marked on the diagram annexed to the findings, they saw a whitehall boat about 300 yards distant, near the steam-ship City of Tokio, between them and the steam-ship, not at the side of the ship nor in contact with it, but a short distance off, pulling with muffled oars in a southerly direction past the stern of the steamer. The boat, when discovered, was probably not less than 50, nor more than 150, feet distant from the ship. At first they thought it was the government lookout boat, but as soon as it had passed the stern of the Tokio, they saw it was not, and gave chase. The boat pulled southerly for some distance, and then turned in on the westerly side of the wharf, where it was met by the officers, somewhere between the City of Sydney and the slips of the Central Pacific Railroad's transfer steamers, as it had changed its course. The diagram shows the situation of the wharves and steamers. In the boat were the claimant, James K. Kennedy, and a boatman named McDermot. Egan says he asked what they had, and "they said they did not know." Egan then jumped into the boat and put irons on the men, ironing them together. Egan says they were very much excited, and that one of them said: "Good God, you are not going to arrest us! We are men of families. Take the stuff and let us go;" that "they would land anywhere and give up the stuff;" that we could "keep the boat and all that was in it, and let them go. It would do no good to arrest them."

After this communication Egan and Smith took the boat in tow, and returned to Folsom-street wharf, whence they had started. It was a stormy night, and the bay was rough; so rough that the claimant and McDermot were afraid that their boat, heavily loaded as it was, would swamp, and being ironed together, and one of them unable to swim, they earnestly asked to be taken into the other boat on that expressed account. Egan refused, whereupon Kennedy commenced throwing overboard some of the packages to lighten the boat; but, upon Egan's threatening to shoot them if they did not stop, he desisted after throwing over three packages similar to those remaining in the boat. The wind was from the south-east, driving the waves—a heavy chop sea—directly against the eastern side of the Tokio, while the Sydney, on the other side of the wharf, was partially protected and in comparatively still water. That it was rough, with considerable sea, there can be no doubt. On that point all the witnesses, including Egan and Smith, agree. Officer Metzler designates it as "a south-east gale." There was, ordinarily, a custom-house lookout boat on watch anchored easterly of the Tokio, a short distance off. This is the boat which the captured boat was supposed to be when first seen. But the sea was so rough on this night that it was deemed unsafe for it to be there, and it was accordingly taken in. Such is the uncontradicted testimony as to the weather and condition of the bay. The weather

grew more stormy and the sea rougher as the night wore on. It was a moonlight night, but cloudy, and at times rainy, and the moon was well down in the west, and hidden by the sheds of the wharf, when the boat was first discovered. On reaching the Folsom-street wharf, officer Smith took the claimant, James K. Kennedy, and McDermot to the district police station, Egan remaining with the captured boat till his return in some 10 to 15 minutes, probably 15. About 5 minutes after Smith left, and while waiting for Smith's return, Egan saw a man at a distance on the wharf, apparently looking for them, but there was no conversation between them, and he was not identified. Upon the return of Smith, two other officers, Metzler and Dillon, arriving soon after, the boat was unloaded and its contents placed upon the wharf, the packages being counted as they were passed out. After being placed upon the wharf, the packages were again counted. There were found to be 97 square packages, weighing 20 pounds each, carefully wrapped in Chinese matting, sewed with twine, and neatly tied or strapped with bamboo splints, in the usual mode of strapping packages of merchandise by the Chinese. Each package contained two soldered tin boxes or cans, the cans being new, weighing 10 pounds each; each can containing 20 small brass boxes; each small box containing one-half pound, or five taels, of prepared opium, labeled with Chinese labels, presenting the same general appearance in all respects as the prepared opium regularly imported from China through the custom-house, except that none of the half-pound or five-tael boxes had United States revenue stamps upon them, the whole amounting to 3,880 boxes. Three like packages, doubtless containing 120 like boxes each, had been thrown overboard. Thus the boat, at the time of the capture, contained 100 packages, or 2,000 pounds or 20,000 taels, of prepared opium, valued at about \$20,000 to \$25,000, as claimed by the United States attorney. There were also found two rolls of silk. Egan says it might have taken 20 minutes to unload the stuff, and Metzler, from half to three-quarters of an hour. Egan passed the packages out, Metzler received them, Dillon piling them up on the wharf.

It is highly probable, therefore, that, from the time of their arrival at the wharf, including the time of the absence of Smith (say 15 minutes) with the prisoners, till the unloading and recounting of the packages on the wharf were completed, three-fourths of an hour to an hour had elapsed, most likely a full hour. After the recounting on the wharf, and while they were waiting for an express wagon to remove the goods, and not before, as inadvertently stated by the district judge, Officer Smith called Egan's attention to a man standing a short distance off, who had approached from the west on Folsom street, when both officers approached him; whereupon the man said: "One at a time; I want to do business with one at a time." He gave his name as Kennedy. It afterwards appeared in evidence, and I so find the fact to be, that this man, who at the time was unknown to the officers, was Henry Kennedy; that he is a brother of James K. Kennedy, the claimant; and that he was, at that time, and on the last preceding voyage of the Tokio he had been, the steerage steward of that vessel. The following is the direct testimony of Egan as to what took place at that interview: "At first he (Henry Kennedy) said if I would let those men go, he would give me two thousand dollars. Then he raised it up to ten thousand, and said we could keep the stuff to let those men go; he did not want to be exposed." And he said, "You can keep the stuff, and I will show you, too, where you can sell it." Egan testified that he sent Officer Smith to him, and after Smith had talked with him a while, he (Egan) talked with him again, when "I (Egan) says, 'What is your business?' He (Henry Kennedy) said, 'I am a calker by trade; but,' says he, 'I am in the smuggling business now,' and, says he, 'if you let these men go, I will give you ten thousand dollars, and you can keep the stuff, and I will put you in the way to make many a dollar hereafter.' I asked him

how it was to be done, and he said, 'In the smuggling business.' He was in the business right along, and he would put me in the way of making many a dollar. He said in twenty minutes he would have the money (ten thousand dollars) here." This is the fullest statement of what Henry Kennedy said on that occasion. He was not arrested. Officers Smith and Metzler testify that they each had a short interview separately with him, and that he made similar, though briefer, statements to them. And Metzler says Kennedy said to him at that interview, in response to an intimation that he would get himself into difficulty, "Well, I have all that I have got, invested in that boat." As there is no contradiction to this testimony of Officers Egan, Smith, and Metzler, and Henry Kennedy did not see fit to take the stand, and he was not called by claimant, I find that these conversations took place as stated.

There had been no communication between Henry Kennedy and the two captives, James K. Kennedy and McDermot, or either of them, after the capture of the boat and arrest of the men, and before this communication between Henry Kennedy and the officers, or afterwards, during that night. Egan and Smith were state police officers, and not United States officers, and had no authority from the United States, or otherwise than such authority as they had by virtue of their said offices, to make said capture or arrest.

The said opium was sent to the city hall of San Francisco, and there detained till some time during the day-time of January 4th, when it was reported and turned over to the custody of the collector of customs of the port of San Francisco, said delivery to said collector being on the land, and not on the water. Queock Keung Chung, who declared himself a judge of the matter, examined one of the five-tael boxes captured, opened it, and smoked some of the opium, and pronounced it Lai Yuen opium, manufactured at Hong Kong.

The foregoing constitutes the facts as shown, and the testimony on the doubtful points as first presented, by the government in the district court. To meet this case, the claimant proved certain facts, and introduced evidence to establish others, which I shall now proceed to briefly state:

There was a strict watch kept on the steamer by government watchmen, both night and day, at all times after her arrival. The night-watch was, ordinarily, regularly changed at 12 midnight, though, when the members of the second watch arrived, they generally relieved the prior watch then, even if a few minutes before midnight. On this particular night, the ship having been nearly discharged, two special extra watchmen were supplied at the steamer; but, it being too rough to be safe, no lookout boat was stationed outside the steamer, as was ordinarily done. On the night of January 3d most of the watchmen, if not all, were relieved before 12 o'clock, at various times from 11:20 to 11:30 P. M., as their successors from time to time came along. If the opium came from the Tokio, it was mostly, if not wholly, loaded before midnight, as the boat was first seen at latest but a few minutes after 12 M. The transactions in removing the opium, if removed from the Tokio, occupied a part of two watches. There were seven men on each watch, two of them stationed on the deck of the vessel, one forward and one aft, and the others at various places along the dock opposite the vessel, and in positions to have that whole side of the ship in view.

All the men on both watches were examined as witnesses, and each testified that he did not see anything leave the ship; that he did not see the boat around the ship; and that the opium was not taken from the ship with his knowledge. The witnesses on the deck also testify that they did not see either the police boat or the captured boat pass the stern of the Tokio in going down or returning, till it got some distance past it on the return. One of them, at least, the man on the after-part of the Tokio's deck, ought to

have seen them, and perhaps the one on the forward part; but the others were not stationed in such positions that they would be likely to see them. Egan and Smith also state that they were hailed from the deck of the Tokio when they passed on the way down; but these watchmen testify that they heard no one hail any boat passing the ship. They testify that they kept faithful and careful watch; that they did not hail the boat, or hear anybody else hail it. The watchman on the after-part of the deck is the only man shown by the evidence whose duty it was to be in a position, or who, at that time of night, was likely to be in a position to hail the passing boat in the position it was stated by Egan and Smith to have been in; and he states that he did not hail it, or hear any one else hail it, or see either boat pass down. He ought to have seen them, unless the roughness of the bay and darkness of the night prevented. But if he did see them, or hail them, it is not apparent what motive could exist to falsely deny it, even if, as is suggested by the government, he was in complicity with the alleged smugglers. It certainly would have much better comported with the theory of the claimant to not only have admitted, but to have insisted, that the boats did pass by from Main-street wharf. That is the theory upon which the claimant's case rests; and if perjury was committed, it might better have been in that form than in the one adopted.

In addition to the night inspectors or watchmen, there was a searching force of three men of several years' experience each, the captain of the force having been six years in the business. They all testify that they thoroughly searched the ship for smuggled goods in every part, so far as it could be done without moving freight about to see what might be under it; that this search commenced on the day after the arrival of the ship, and continued from day to day down to the time of the seizure; that, although absent on some days, they were there, from time to time, during all of the time while freight was going out, to see what went out, and then examine the parts of the ship that had been discharged; that at the time of the seizure all of the freight had been discharged except a portion of the freight in the forward hold, and that that part of the ship had been searched so far as was practicable without moving the freight; that heretofore they had never found opium under other freight. It was expected that all the remainder of the freight would be discharged by 10 A. M. of the next day. It was not pretended that the searchers were there all the time, but it was claimed that they were there sufficiently to make a thorough search of the entire ship so far as was practicable without removing freight. The captain of the searchers says there was "no part of the ship but what we examined thoroughly; that is, that we could search, of course. Where the freight was, we could not search that." And he says he searched with the "incentive of a reward ahead in case of success." The other searchers testify to the same effect, and that they did not find the opium. There is no direct testimony to the contrary as to the search or its extent. As showing the incentive to diligence referred to by these witnesses, and as indicating the interest and bearing upon the credibility of Officers Egan and Smith, it may be observed, in passing, that, under the act of 1874, (1 Supp. Rev. St. 77, § 4,) the secretary of the treasury is authorized to allow a reward to "*any officer of the customs, or other persons,*" who shall detect or seize any smuggled goods, not exceeding in amount *one-half of the net proceeds*.

One B. K. Sheridan, owner of an express wagon, testified on behalf of claimant that on the evening of January 3d he hauled two loads of packages like those seized, making about 100 in all, from the store of Tai Hung & Co., a Chinese mercantile firm, No. 1014 Dupont street, for James K. Kennedy, the claimant, to the foot of Main street, corner of Main street and the water front, near Bryant street, shown on the annexed plat. He stated the facts in detail, and minutely. He said, by previous arrangement he went to 1014 Dupont street, arriving a little after 7 P. M., where he found claimant, James

K. Kennedy, waiting on the sidewalk; that he had a covered wagon; that a Chinaman, Choy Lum, assisted by another, brought the packages out, and he arranged them in the wagon; that, after putting in his wagon about 50 packages, he judged, without counting them, Kennedy got on the seat with him, and he drove to the water front at the foot of Main street, at the corner of the Bryant-street front, a few feet from a small building, supposed to be the wharfinger's office, where he passed the packages out to Kennedy, who lowered them down by a rope and hook on it to somebody in a boat under the wharf; that, after thus passing them down, he returned for the second load, when the same Chinaman, Choy Lum, and another, brought out the remaining packages, and he loaded them in the same way, when the Chinaman, Choy Lum, who brought him the packages, rode down with him to the same place, where he passed them out to the Chinaman, who let them down from the wharf to Kennedy and another man in the boat below, in the same manner as the first were lowered by Kennedy; that two rolls of silk were also carried down in his wagon on one of the loads. He testifies that he arrived the second time somewhere from 10 to half past 10 o'clock; that he thought he did not carry quite so many packages at the last load as at the first; and that there were about a hundred in all. He states that he then returned, the Chinaman riding back with him to Montgomery avenue, where the Chinaman got out, near the Commercial Hotel, and he went to his stable and put up his horse at No. 2333 Taylor street. He testified that he had hauled similar packages for Kennedy, some six months before, from the same place to the foot of Mission street, to be put aboard a packet for the Sandwich islands; that he understood those packages to contain opium, to be shipped for the Sandwich islands; and, as those hauled on January 3d were similar packages, and hauled under similar circumstances, he supposed they were opium; but Kennedy did not state to him that they were opium.

In the district court neither the claimant, Kennedy, McDermot, nor the Chinaman, who are alleged to have aided in loading and unloading these packages, was examined to corroborate the testimony of Sheridan. On the other hand, a witness was called who testified that he slept at Sheridan's stable on the night of January 3d; that the stable was locked, and he had the key; and that Sheridan could not have had the horse and wagon out, and used it, as he had stated. But there were such inherent elements of weakness in the testimony itself, when taken in connection with other testimony, as to his habits and whereabouts at about the time, being some two months before he was examined, and such manifest ill-feeling and desire to punish Sheridan for imputed injuries, that the district judge attached no importance to it, and I reject it also as wholly unworthy of credence.

As to the testimony of the other three witnesses referred to by the district judge, who testified to Sheridan's spending the whole evening of January 3d, more than two months before, at a free concert saloon, which the district judge did not wholly discredit, I entertain a different view. After carefully considering their entire testimony and the opposing testimony on the point; the character and habits of the men, as disclosed by themselves; the glaring inconsistency of some of their testimony; and the manifest inherent improbability of their story in the most important particulars, and the more probable counter-testimony,—I am unable to attach any importance to it. Whatever the truth may be as to Sheridan's hauling the packages as he states, I am not satisfied that he was at the saloon mentioned on the night in question. He had never been seen there before or afterwards by these men, who said they were there every night; one of them saying he had not missed a night for a year and a half. On the contrary, I am satisfied, from a careful consideration of all the testimony on that point in all its bearings, that he was not there; and I so find.

Upon opening the tin boxes of the seized opium, wrapped in matting, each

large tin box was found to contain pieces of San Francisco newspapers of recent dates,—dates so late that it is impossible that they should have been put in in China. They must therefore have been put in either on shore in San Francisco, or on the steamer after her arrival at San Francisco, and the tin covers afterwards soldered on, and the cans then packed in matting, sewed, and bound. The tins were *old*, but the covers *new*, and *newly* soldered. There are two factories at Hong Kong, as shown by the evidence, manufacturing opium: one known as Lai Yuen, and the other Fook Loong. The opium seized is put up like these two brands of opium, in similar boxes, with apparently similar labels, either genuine or attempted imitations of the genuine labels. The smoking opium made at those factories is manufactured of India or Patna opium. The evidence points to no other factories or kinds of opium made in Hong Kong. Considerable quantities of smoking opium have been, and still are, manufactured at San Francisco and in the eastern states. The smoking opium made in San Francisco and in the eastern states is made entirely from Turkish or gum opium. The Turkish or gum opium contains a much larger proportion of morphine than Patna opium. The prepared opium manufactured in the United States is put up and labeled so as to resemble prepared opium imported from Hong Kong, and is often put up in the old boxes of the imported article. Imported opium is required by law to be stamped, but it is not necessary to stamp domestic opium. The government, however, furnishes stamps expressly prepared for the purpose, on application, for domestic opium, and these are frequently, but not always, used as a convenient mode of protection from suspicion and annoyance. The laws of the Sandwich islands absolutely prohibit the importation of opium, except by the board of health for medicinal purposes, under heavy penalties, and even make it a penal offense to have it in possession, except for medicinal purposes, under clearly-defined regulations. Opium, duty paid, at San Francisco, was worth \$12.50 to \$12.75 per pound, and would sell in Honolulu for from \$25 to \$30 per pound, and sometimes even higher,—even at times as high as \$60. Hong Kong opium is higher in San Francisco than domestic opium. There were 40 men, in the aggregate, at different times, employed by the custom-house in looking after the Tokio while in port. At Honolulu the custom-house force does not exceed four men in all, as appears from the testimony of the Hawaiian consul; and the consul has reason to believe that considerable opium is smuggled from San Francisco into Honolulu, and that it is done both by sailing vessels and steamers. There was no custom-house watchman over the City of Sydney on the night of January 3-4, 1882, there being only the single watchman of the steamer on duty; and the water on the sheltered or westerly or port side of the steamer was comparatively smooth, as contrasted with the water on the eastern side of the Tokio.

Miles A. Short was employed on the City of Sydney as a water tender in the engineer's department, and joined the ship on January 1, 1882, which was advertised to sail on January 14th. Short testified that he had an arrangement with James Kennedy "to take some stuff on board the City of Sydney, and stow it away for him, and keep it in my [his] charge until I went to Honolulu and delivered it to him." And it was to come at 12 o'clock; between 12 and 1 o'clock,—somewhere about that time,—"and Kennedy was to be there the night of the third, or morning of the fourth, about that time." He testified that he (Short) was there at the time, for the purpose of receiving the stuff, and saw two boats pass by the stern of the Sydney; that he arranged with Kennedy to take the stuff in through the coal port on the port side, and that he opened the port to take it in at about half past 11 o'clock; that he was to get a dollar a pound for assisting Kennedy; and that he had several times smuggled opium into Honolulu before on the steam-ship City of New York, the companion ship of the Sydney. Kennedy was to go on the steamer to Honolulu.

On March 16, 1882, a Chinaman approached at the proper window of the post-office at San Francisco, with a sealed package in his hand, had it weighed by the clerk to ascertain the proper amount of postage, purchased the necessary stamps, and was about to affix them and deposit the package in the post-office, to be carried by the mail about to leave for China, when he was arrested by Officer Lynes, by the direction of the United States attorney, who was present, and the package taken from him. The package was duly sealed and addressed, "Messrs. Tong Tang Wo. No. 1 Bornhan, Strand street, (corner,) Hong Kong, China; per steam-ship Oceanic." On the corner was printed, "Erom Kwong Hon On & Co., 736 Commercial street, San Francisco." The package, being opened, was found to contain several letters, each in a sealed envelope, in Chinese language, and written and addressed by various parties in San Francisco to various parties at Hong Kong. Among these letters was one written in broken English, and sealed up in a separate, smaller envelope with another brief letter in Chinese, and addressed on the outside, "Charley, Hong Kong." The following is a copy of this letter, and the signature is shown and admitted to be that of one Joseph Goetz. The letter is as follows:

"SAN FRANCISCO, March 16, 1881.

"*Friend Charley*: This time Oceanic come again, but Murray not come; he sick, and can do nothing about the trial in court about the opium; it will be decided in a few days, and in our favor, as I expect so, and everybody the same. I am sorry you did not get the telegram from here to stop the letter to that bith, in account of the trouble of Tokio. I did not want it delivered, but can be helped no; all I wanted for Harkins not to no anything about, but I think she will tell Hennessy about it as soon as the case is decided. I will go to Europe and bring the children bak whit me to San Francisco. This is about all, about the money to is over there on my account. James Kennedy will give you particulars what to do whit my return of Tokio, perhaps he will order the money to return, or give it to Henry Kennedy, so must be prepared for it in case that should be so. And about our account, everything is all right, only you charge me for the draft one dollars, and so on every time latley, and don't want this for you to charge so. I will send you my accounts, and I want you to correct it, total, \$15,871.33, this include Murray money for the opium ho was bought and return to you again. About the Carpenter money, I don't no yet, but I will see before this letter is close what he intends to do. This is about all; and as I said before, the busines looks bad at present, and the only change is now to do the cargo busnies here, but there must be one house ho imports some goods every steamer, and everything will be all right, so you can think about it, and if you like, you can send some goods right on, consigned to some name a few steamers ahead of it, before sending any stuff. This is about all. I hope this will find you in good health, the same I am at present myself. Yours truly, friend,

"JOSEPH GOETZ.

"N. B.—Write to me in Europe; you no my address, if you have any news for me."

The following was written by James K. Kennedy on the same sheet following the preceding:

"*Charley*—DEAR SIR: You will please pay the carpenter back his money that he paid for the stuff, if he wants it, and if he wants to take it in stuff give it to him anyway he may want it.

"Give my regards to Oh Yep, and oblig me,

JAS. K. KENNEDY.

"P. S. Carpenter will present a card from me.

J. K. K."

Goetz's note was left with the Chinese firm, who inclosed the letter in the package to be mailed. It was left unsealed, in order that Kennedy might see

it, and append anything he desired, and Kennedy was notified of the fact; whereupon, he went to the store and wrote the paragraph signed by him. He was aware of the contents of Goetz's letter. There is no evidence that Kennedy knew anything of the contents of the Chinese letters, either the one inclosed in the smaller envelope, with his own and Goetz's, or those separately sealed and addressed, and found in the large general package; but evidently he did not as to the letters not inclosed with his.

The Chinese letter inclosed in the same small envelope with Goetz's letter, being translated, is as follows:

"Jim Kennedy said last trip, Murray brought the 100 pounds of opium. Of course, send them on return of steamer. Murray took sick; not come on this steamer. The *carpenter* of the steamer, I don't know his name, goes to Hong Kong, and if he wants one hundred pounds let him have it, and help buy it, and deliver it to him; or if he wants the money back, deliver to him also. He has a *ticket from Jim Kennedy as a proof*. If you see the ticket deliver to him all right.

"*This year, 1st month, 28th day.*

Brother,

"WOO CHING."

Various tests were made in the district court by experts, to determine the character of the opium seized. Mun Tong examined nine boxes by applying smoking and burning tests. Of these, four were Hong Kong boxes, furnished by the government, and five were taken by permission of the government from the seized opium. In every instance he distinguished the seized from the imported opium, and declared that the seized was domestic opium. He was afterwards put to a severe test before Commissioner Hoffman. Sixteen boxes, each being carefully wrapped so as to conceal the labels and boxes, and leave nothing but the opium exposed, were tested. Ten of them were of the seized opium; five genuine Hong Kong opium, furnished by the custom-house; and one of admitted San Francisco manufacture, not of the seized lot. The test occupied several hours, three separate smokes being taken from each box, making 48 smokes in all. He determined 15 out of the 16, declaring which was domestic and which was Hong Kong, and only failed on one. Chow Suey also made several successful tests in the same way. Some other witnesses making similar tests were not so successful, making mistakes both ways, their testimony being about as favorable to one side as to the other. So, also, 20 boxes of the seized opium were selected at random and marked, and 20 of the imported furnished by the custom-house selected and marked. They were placed promiscuously on the table, and up so as to expose the top only. The Chinese experts rapidly selected and separated the Hong Kong from the seized opium without a single mistake in the 40 boxes, claiming to detect them by the difference in the labels, the imitations not being close. A similar successful selection was made by arranging them so as to expose the side labels only. Mr. Van Duzer, the assistant United States attorney, also separated them by the appearance of the boxes and labels, claiming that he did it from the *newer* appearance of the labels in the seized lot. Mr. Van Duzer, in his printed brief, says: "I relied on the new appearance of the labels and boxes, and had no difficulty in segregating them." If so, this would indicate that the labels had been recently put on here, or on the way, and had not been much handled, thus tending to support claimant's theory. It would seem to be something of a feat to secretly paste three labels on each one of 4,000 boxes necessary to be concealed during the voyage from China, or during the nine days while the steamer lay at the wharf, with three government searchers—unless acting in concert with the smugglers—on the watch, and afterwards pack them and solder them up in 200 larger tin cans containing the late newspapers, and then pack them in matting, such as the packages were when seized. The seized opium was packed in *old* 10-pound tins, with new covers

soldered on. The several searching officers on the Tokio testified that, in their opinion, it was not possible for a ton of opium to be concealed on the Tokio, taken out of its place of concealment, and soldered up on the Tokio during the time that ship was in port, without being discovered; that there was no place on the Tokio where the soldering could be done without discovery; that fires were not permitted on the Tokio while in port; and that it would be impossible to carry the large tin cans used aboard the ship without discovery, there being officers, men, and watchmen at all times on the deck and the ship.

The foregoing, so far as it purports to state the facts, are the facts established by the evidence; and where the evidence is stated as evidence, the substance of the important evidence in the case, as it was presented in the district court.

The claimant, as we have seen, produced testimony to show that the opium seized was taken from the store of Tai Hung & Co., at No. 1014 Dupont street, carried to the foot of Main street, and loaded in the boat; but there was no effort to trace it beyond that, or to show the particular place where the opium was in fact prepared. It was shown that opium was manufactured at San Francisco from Turkish opium, and also at Newark, New Jersey; and witnesses testified, from the looks of the opium, and from testing it by smoking, that, in their opinion, it was San Francisco made smoking opium, prepared from Turkish or gum opium. Beyond this general opinion the claimant did not attempt to go or to trace the opium, and it was in consequence of this failure to show where and by whom the opium was manufactured; from whom the crude opium was obtained, etc.; and because other testimony, presumably within the claimant's power, corroborative of Sheridan's statement, if true, was not produced,—that the district court found against the claimant, and condemned the opium, as appears by the opinion of the judge; reported in 8 Sawy. 140, 141; S. C. 12 FED. REP. 402.

In this court much testimony upon these points, where proof was wanting in the district court, was introduced. The claimant, James K. Kennedy, himself appeared as a witness. He testified that on the evening of January 3d, at about half past 7 o'clock, Sheridan met him, by previous arrangement, at No. 1014 Dupont street, where a part of the seized opium was loaded into Sheridan's express wagon,—a little more than half, he thought, but he did not count the packages;—that the packages were passed out of the store of Tai Hung & Co. by Choy Lum and Choy Suey, he (Kennedy) standing in the door of the store at the time; that he directed Choy Lum to go down with the next load, and then got on the wagon himself, having the two rolls of silk, with Sheridan, who, by his direction, drove to the foot of Main street, at the corner of Main street and the water front; that upon arriving there, Sheridan passed the packages out of the wagon to him, and he let them down to McDermot, who was in a boat under the wharf waiting for him by previous arrangement, by a rope and hook, when McDermot received them and stowed them in the

boat, after which Sheridan went back to 1014 Dupont street for the other load; that he (Kennedy) then slid down a pile and got into the boat, where he and McDermot arranged the packages already in the boat, and then awaited the return of Sheridan with the remainder; that in due time Sheridan returned with the other load; that Choy Lum, as he had before directed, came with him; that Sheridan passed the packages out of the wagon to Choy Lum, who let them down to him by the rope and hook, who received them, and McDermot stowed them away; that after unloading Sheridan and Choy Lum left in the wagon together; that they got through somewhere about half past 10 o'clock.

Choy Lum testifies to the transaction in all material particulars, giving precisely the same account of what transpired as that given by Sheridan in the district court, and Kennedy in this court, and stated that he counted the packages as they were loaded, and that there were 55 packages and the silk in the first load, and 45 in the second. He stated that he went down with the last load by Kennedy's directions, then returned with Sheridan to somewhere about Pacific street on Montgomery avenue, where he got off and went home, while Sheridan went in the direction of his stable; that he got to the store about half past 11,—the testimony corresponding fully with that of Sheridan and Kennedy. He also says that he was aided in passing out the packages from the store to Sheridan by Choy Suey, his brother and partner. Choy Suey gives precisely the same account of what took place at the store as that given by the others: that the first load contained 55 packages, and the second 45; that his brother, Choy Lum, was directed by Kennedy to go down with the second load, and he went, returning about half past 11. McDermot gives the same account as the others as to the unloading and passing down of the packages into the boat. He states that he knew Sheridan, and, although he did not see him, being under the wharf, he recognized his voice, and said: "Hallo, Tom! Is that you?" Sheridan, Kennedy, Choy Lum, Choy Suey, and McDermot agree in their testimony as to obtaining and loading the seized opium at 1014 Dupont street, and unloading it and passing it into the boat at the corner of Main street and the water front. This testimony is consistent in itself, and, independent of any other testimony affording a contrary inference, contains no apparent inherent improbabilities. To discredit this statement, a man is called who testifies that on that night, from about dark till after midnight, he was stationed as a watchman on a vessel lying on the other side of Main-street wharf, about 100 feet from the water front; that it was also his business to keep a lookout for a lumber-yard, situate on the north-west corner of Main and Bryant streets, diagonally across the wharf and street, and to do so he had to look from his station on the vessel across the point where Sheridan is said to have unloaded the opium; and that he did not see any wagon there, or anybody unloading opium, or otherwise. He did not

leave the vessel, but not only watched the vessel, but also the lumber-yard from the vessel at a distance. Kennedy and McDermot both testify that they remained under the wharf till about half past 11 o'clock, when, by the direction of Kennedy, they started from their place of concealment, and pulled for the City of Sydney, for the purpose of putting the opium aboard the Sydney; that they pulled out, passing the end of Beale-street wharf, then past the stern of the Tokio, which, according to the plat and scale, is from 665 to 670 yards, or more than a third of a mile, from the starting point. They testify that at no time going out were they within 100 or 150 feet from the Tokio; that, owing to the wind and the tide, after passing the Tokio, they made a larger circuit than would otherwise be necessary, and then turned in and rowed directly for the Sydney; and when within 30 or 40 feet, more or less, from her, (amidships,) they were captured; that they did not see the pursuing boat until they had turned in, and were pulling directly for the Sydney. In going back, both Kennedy and McDermot state, and the officers Egan and Smith admit, that they passed so near the Sydney that their oars touched her stern, Egan and Smith saying in consequence of the space required to turn round in. As to what took place at the capture, and afterwards, there is but little discrepancy between the testimony of the parties and that of the officers. The only material difference is in the language used by Kennedy, and what he meant. It is not quite so strongly stated by them as by Egan. Kennedy testifies that when Egan said he was going to take them to the station-house, he told him "to take it, and let us go;" that "I meant that we should go with the stuff, of course;" "that they should take it along with us to the station;" and McDermot said that he heard no such remark as, "Good God, you are not going to arrest us! We are men of families," etc. They state that they did not see the pursuing boat until they had passed the Tokio and turned in, and were pulling directly for the Sydney; that they heard the oars of the other boat before they saw the boat. And Egan and Smith admit that the captured boat had turned back before it was overtaken.

Kennedy testifies that he bought all this opium through Tai Hung & Co., at 1014 Dupont street, in five different lots of 400 pounds each, at five different times through the month of December, 1881; that he did not know of whom Tai Hung & Co. purchased the first lot till after it was purchased, but he then ascertained that it was purchased of Hop Kee & Co., another Chinese firm, and that when the subsequent orders were given to Tai Hung & Co., he knew they expected to get it of Hop Kee & Co.; that Tai Hung & Co. bought it in large packages, packed the opium in small boxes, labeled it, then put it up in larger cans, and then in packages, as it was found when seized, in accordance with his instructions; that he purchased of Tai Hung & Co. because he could get it fixed there just as he wanted it, and he only knew Hop Kee by reputation; that he furnished the newspapers

and had them put in the large tins to keep the small tins from rattling, and also to have it as evidence in case he should want it. These newspapers all bore date so late that it was impossible that they could have been put in before the steamer arrived at San Francisco, some of them bearing date the day before the arrival of the steamer; that he did not know there was a private stencil-mark of Tai Hung & Co. on the back of the label, as it afterwards appeared there was, on each box.

Kennedy further testified that he furnished the money to Tai Hung & Co. to pay for the opium, from time to time, on each occasion, as it was purchased; that he borrowed \$10,000 of this money for the purpose from Joseph Goetz, the party whose name appears in other connections in this case, but that Goetz had no interest whatever in the opium, he (Kennedy) being the sole party interested in it. He also testified that of the money used by him he obtained \$3,400 or \$3,500 from his brother, Henry Kennedy, before he went on his last trip to China. In corroboration of Kennedy, Choy Lum testified that he had for over three years been a merchant, dealing in opium, dry goods, and general merchandise, at No. 1014 Dupont street; that he was a member of the firm of Tai Hung & Co., composed of himself and his brother, Choy Suey; that on December 2, 1881, he sold to the claimant, Kennedy, 4,000 taels domestic opium,—that is, opium called gum or Turkish opium, prepared in the United States; that he bought it of Hop Kee & Co.; that when he bought it, it was put up in large tins, like coal-oil cans, containing 200 taels each; that Kennedy directed him to put it up in small tins containing 5 taels each, and then to put them up in 100-tael tins, or 20 small 5-tael boxes in 1 tin; that he put them up as directed, using old boxes, from which he soaked and rubbed off the labels, and put on new ones, and put 20 of the small 5-tael boxes in 1 tin can; that one Ah Hock, a Chinese tinsmith, soldered on the covers; that he cut the covers out of new tin himself; that he packed two of the large tins together in Chinese matting, sewed the matting, and then tied it with bamboo splints; that, by the direction of Kennedy, he put pieces of newspapers furnished by him in each large tin; that it takes four to five days to pack up 400 pounds, or 4,000 taels, in this way; that he paid for it before taking it away with money furnished by Kennedy; that after this lot Kennedy ordered 4,000 taels more, which were bought and put up at his store in the same manner until he had given five orders of 4,000 taels each, so as to make up 20,000 taels; that all were purchased, paid for, and put up in the same manner; that all, except the last order, were filled by purchases of the same kind of opium of Hop Kee & Co. But on the last order Hop Kee had only 2,000 taels, and he bought the remaining 2,000 taels of Tuck Kee, another Chinese firm; that the opium bought of Hop Kee & Co. was in large coal-oil tins, containing 200 taels each, but the 2,000 taels bought of Tuck Kee was already put up in five-tael boxes, but with-

out labels on them; that all bought of Hop Kee he put up in the same manner at his store; that, after putting the opium in five-tael boxes, he put on the labels, some in imitation of Lai Yuen and some of Fook Loong; that he also put the labels on the 2,000 taels bought of Tuck Kee, which had been put up in five-tael boxes before he purchased it, but had not been labeled.

The labels consist of two red labels and one white one, corresponding in width and length with the sides of the box to which it is attached, put on three sides of the five-tael boxes. He testifies that he had stamped on the back of the label on each—on the side pasted next to the box, near the bottom—the words "San Francisco," in printed letters. In reply to a question by the United States attorney he said he had the stamp with which he so stamped the labels at his store, and he could produce it. By direction of the United States attorney he produced in the afternoon a piece of India rubber with the words "San Francisco" formed on it, with materials for stamping, and stamped with it similar labels produced by him. Upon moistening the labels on the boxes seized in question, and turning them up, each label was found to be stamped, as Choy Lum said it was, with the words "San Francisco," exactly like the one made with the India-rubber stamp produced. So, also, the genuine Lai Yuen and Fook Loong opium boxes produced in evidence have each impressed upon it a peculiar Chinese character, about one-half an inch wide by three-quarters long, a little longer on the Fook Loong than on the Lai Yuen, stamped with a die in the tin cover of the box.

The seized opium outer tins had similar stamps, apparently corresponding generally with the respective stamps of the kind of opium represented. Choy Lum presented two steel dies, exactly corresponding with the dies used in stamping the seized opium outer tins, with which he said he stamped those tins. He stamped pieces of tin with them when testifying, which were put in evidence. An engraver was examined, who used a magnifying glass to inspect the stamps, and he measured the respective impressions, and pointed out very marked differences between the impression on the seized opium tins and those made by the dies produced corresponding with them and those on the genuine opium, showing that those on the seized were not the genuine stamps of the manufactory. So, also, Choy Lum stated that the labels on the seized opium were not the same. There were decided differences in the characters, though generally resembling each other in appearance; and there were also differences in the shades of the paper, the red Chinese paper being brighter, and the white lighter, than that used here. He also produced wooden engraved blocks upon which many of the labels on the seized opium were said to have been printed, and labels were printed from them corresponding with those on the tins. He testified that similar labels were printed here in large numbers, and his testimony was corroborated by printers who had printed for him and others.

Choy Lum testified that he put on all the labels and marks and the words "San Francisco" himself. Some were marked and labeled "Fook Loong," and some "Lai Yuen," about 9,000 taels being marked and labeled "Fook Loong;" that his partner and nephew helped pack and label the opium. Choy Suey, brother and partner of the last witness, gave precisely similar testimony upon all these points; and Gu Ah Hock testified that he, at Tai Hung & Co.'s store, soldered on the covers of the tins, containing 20 small boxes each, with pieces of newspaper in them, at the several times of the purchases in December mentioned. Upon cross-examination and demand of the United States attorney, Choy Lum hunted up and brought into court what purported to be the receipted bills for the five lots of opium claimed to have been purchased from Hop Kee and of one lot of Tuck Kee, which corresponded in dates and all other particulars with the facts as before testified to by Choy Lum. They appeared on their face to be in all particulars bills made in the regular course of business, with nothing intrinsic in the papers, or the testimony of the witness in regard to them, to throw discredit on them. The following is an example, as translated in the evidence:

"Tai Hung & Co., bought of Hop Kee & Co., domestic opium, 4,000 taels, \$0.85 a tael.

"Rec'd payment in full.

"Dated December 4, 1881.

[Stamped]

"HOP KEE & Co."

These bills of Hop Kee bore date, respectively, December 1, December 4, December 12, December 24, and December 29, 1881. Choy Lum testified that these receipted bills were received at the time they bore date, and when the opium was purchased, in the regular course of business; and a member of the firm of Hop Kee & Co. testifies that his firm sold the opium to Tai Hung & Co., as stated by the members of that firm and in the several bills in evidence, and that these are the genuine receipted bills given at the time of the transactions, and at the respective dates they bear. And Wy Noon, of the firm of Tuck Kee, testified that his business was the manufacture of domestic opium; that on December 26th he sold to Tai Hung & Co. 2,000 taels opium prepared by him, put up in five-tael boxes, without the labels on the boxes; that he made it of Turkish opium bought of Downing & Son, 14 Second street, San Francisco; and a receipted bill bearing date December 26, 1881, was produced by Tai Hung & Co., which he stated was the same bill delivered at the time.

It was proved beyond all ground for controversy that Hop Kee & Co. had a manufactory of prepared opium at Newark, New Jersey, prior to 1880, which was closed up about the last of December, 1879, or first of January, 1880; and I so find the fact to be. This appears by uncontradicted evidence as well as by reports of the United States revenue officers of that district. It is not denied by the United States that it was in existence and operation to that date, and it is

not claimed by claimant to have been in operation since. Smoking opium was prepared by this firm out of Turkish or gum opium, purchased from Lanman & Kemp, well-known druggists, in New York city. It also appears beyond all doubt, and I so find the fact to be, that in February, 1880, there were 25 packages or boxes, each inclosing 2 large tin cans about the size of coal-oil cans, containing each 40 pounds of prepared opium, or 2,000 pounds in the aggregate, shipped from Newark, New Jersey, through Lanman & Kemp, of New York, from whom the crude opium had been purchased, to Downing & Son, San Francisco, to be delivered to Hop Kee & Co., upon the payment of certain charges, which charges were paid, and the packages delivered by Downing & Son to Hop Kee & Co. Choy Lum produced a box, and the cover of another, as a box and cover of another box in which he bought some of the opium in question of Hop Kee & Co., the cover having parts of seals of Hop Kee & Co. put on at Newark, and the cover having the address to Downing & Son and other marks stenciled or printed on it, which were identified by a member of the firm of Downing & Son and by the drayman who hauled the packages from the railroad office to Hop Kee & Co., as being one of, or at least wholly like, the boxes so received by Downing & Son for Hop Kee & Co., from Newark. Of the fact that Hop Kee & Co., in February, 1880, received 2,000 pounds of prepared opium from Newark, through Downing & Son, there can be no question on the evidence; and I so find the fact to be.

Loo Gee Wing, one of the members of the firm of Hop Kee & Co., also testifies that at the time of the receipt of said 25 boxes in February, 1880, Hop Kee had on hand 6,000 pounds of opium prepared at Newark, making in all, including the 2,000 pounds received through Downing & Son, 8,000 pounds. He also testified that the 18,000 taels, or 1,800 pounds, of opium sold by Hop Kee & Co. to Tai Hung & Co. at the several times in December, 1881, for claimant, Kennedy, was what remained of the said 8,000 pounds of opium manufactured at and received from Newark, New Jersey. And Choy Lum testifies that to make up the 20,000 taels wanted by Kennedy he bought of Tuck Kee 200 pounds, or 2,000 taels, manufactured by him at San Francisco. There is no direct evidence to contradict any of this testimony as to the sale of so much opium by Hop Kee & Co. to Tai Hung & Co., or that it was not the remnant of the opium prepared by Hop Kee & Co. at Newark; but it appears that Hop Kee & Co. had borrowed of Joseph Goetz, the same party whose name appears in other parts of the testimony, some \$6,000, upon which they were paying interest. And it is insisted by the United States attorney that it is highly improbable that such would be the case while they were carrying \$20,000 worth of opium which could at any time be disposed of. On the other hand, it is insisted that business men might well think it better to pay interest and carry stock for a better market. It is also shown by the testimony that some one, probably

Loo Gee, acting on behalf of Hop Kee & Co., made a statement to the assessor, for the purposes of taxation, in March, 1881, in which the word "opium" had been written, and afterwards erased, from which it is argued that the firm had no opium in March, 1881; and as they went out of that business and of the manufacture of opium in San Francisco not long after that date in that season, they could not have had any on hand, and especially of Newark manufacture, at that date, and consequently none to sell to Tai Hung & Co., in December, 1881.

It was shown by the records of the custom-house that Hop Kee & Co. had obtained stamps for domestic opium prepared at Newark, from November 19, 1879, to August 24, 1880, to the number of 5,080, sufficient for 2,540 pounds; and from April 22 to August 25, 1881, for domestic opium, purporting to have been made at San Francisco, to the number of 793, sufficient for 396 pounds of opium. To this is replied that there was no law requiring stamps to be purchased for such opium, and it was optional with the manufacturer whether he would use them or not, it being a matter for his own convenience. No testimony is introduced to show that all stamps purchased are used, or that stamps are in practice purchased for all manufactured, or that stamps are put upon any but such as is put up in small five-tael boxes for retail; while the opium sold in bulk, as this is claimed to have been, to Tai Hung & Co., it is insisted is not stamped; and there is no evidence that it is stamped in practice when sold in this form in bulk in large quantities. It is also insisted by the claimant that the purchase of a considerable quantity of stamps between April and August, 1881, is conclusive evidence that Hop Kee had opium on hand in the preceding month of March. Hop Kee & Co. then had a manufactory of domestic opium at Newark, New Jersey, prior and down to about January 1, 1880; and also as late as February 24, 1880, the firm had at least 2,000 pounds of the opium prepared at that factory on hand, and if Loo Gee Wing testifies truly, the firm at that time had 6,000 pounds in addition, making an aggregate of 8,000 pounds then on hand. There is no intrinsic improbability that his testimony on this point is not true, and no direct testimony to the contrary. Whether he had 18,000 taels or 1,800 pounds of this opium still remaining to sell to Tai Hung & Co., and whether he did so sell it in the month of December, 1881, must be determined by the direct testimony of Loo Gee Wing, Choy Lum, Choy Suey, Kennedy, McDermot, and such other facts and testimony stated, and inferences therefrom, as bear upon the question, including the Chinaman who says he soldered the tins for Choy Lum. It is a question of credibility to be determined upon all the evidence. It should be stated that the claimant, Kennedy, had been acquainted with Choy Lum over three years, and that they first became acquainted while they were working together on steamers running to China. Goetz also appears to have loaned money to Hop Kee & Co., as well as to

have advanced money to Kennedy to purchase the opium in question, and thus to have had business relations with these dealers in opium, both Chinese and Americans. On appeal, the government introduced testimony to rebut that of Short.

Lisseck, the first officer of the City of Sydney, testified that when the ship was in San Francisco, about the first of May, or some four months after January 3, 1882, he experimented with the coal port, which Short said he opened alone, to take in the opium, to see if it could be done by Short, as stated by him in the district court. Lisseck's evidence was that at that time, to open the port, it required a series of seven or eight heavy blows with a scantling six or eight feet long, and three by six inches in size, making a loud noise that could be heard all over the ship; and that it could not well be opened by one man alone, he always sending another man with the carpenter, whose business it was to perform that duty, to aid him. Three other men, who witnessed the experiment, corroborated his testimony. Some of these witnesses said this port opened to the side, and some that it opened upwards.

There appears to me to be some tendency to exaggeration in these witnesses concerning the difficulty of opening this port. It would seem to require a very heavy steel plate to stand those blows, as described, without injury.

It was said, however, that the port had not been opened for a long time, and the screws were so rusted as to make it difficult to turn the nuts, and that the port was thoroughly packed in India rubber to make it tight. It may well, by long disuse, have become firmly bedded, so as to adhere with greater tenacity at this time than on the third of January, it being four months after Short's alleged opening of the port, although it had doubtless been opened in the mean time.

To rebut this testimony of Lisseck and his associates, offered by the libellant, one Coutts testified on the part of claimant, who said he engaged as ship-carpenter on the Sydney on the voyage succeeding January 3d; that he entered upon his duties as such either on January 8th or 9th, five or six days after the day when Short says he opened the port; that, it being his duty to do so, he immediately examined the coal ports to see that they were in good working order; that he opened the starboard port without difficulty, alone, giving two or three light blows with what he called a five-pound maul or sledge; that he found already open the port coal port, (which is the one Short said he opened on January 3d or 4th,) and closed it; that he kept the ports well oiled while he had charge of them, and he could open them alone without difficulty; and that they were in good condition when he *first* examined them. Robinson, the superintending engineer, said he thought one man might open the ports, he having a small monkey-wrench to remove the nuts; and another witness said he thought the ports could be opened with a five-pound hammer. It

does not appear who left the coal port open when found open by Coutts. It may have been Short, when he opened it on the third, if he did open it. Such is the testimony *pro* and *con*, with reference to the practicability of opening the port by Short, Short having before testified that he did open it to take in the opium. There was testimony also tending to show the impracticability, and the contrary, of landing the opium at Honolulu during the short stay of the steamer, from 6 to 16 hours.

Dr. Burrell testified that he was a regular graduate in medicine, and was an employe of the government in examining drugs and chemicals at the appraiser's store; that no crude opium is allowed to come into the United States that contains less than 9 per cent. of pure morphia, that being the minimum; that the crude Turkish opium he admits into this port contains from 9 to 18 per cent. morphia; that the only specimen of crude Patna opium, which he analyzed out of curiosity, only contained four and a half per cent. morphia; that crude Patna opium does not come here, as it is not admitted; that he analyzed opium from boxes marked, respectively, "A," "B," and "C," boxes A and B having been seized by the government on the steamer as genuine Hong Kong prepared opium, respectively, June 27, and March 29, 1882, and box C being one of the boxes in question seized January 3, 1882; that box A of the Hong Kong opium contained 4.70 per cent.; box B, 6.08 per cent.; and box C of the *seized* opium, 9.18 per cent., a considerably larger per cent. than even crude Patna opium contains, and large enough to admit it as crude Turkish opium.

In accounting for the presence of Henry Kennedy soon after the capture, the claimant, James Kennedy, testified that he had requested his brother Henry to be at Beale-street wharf on the lookout from 8 till after 11 o'clock of the night of January 3d, and that it was in obedience to this request that Henry Kennedy was on hand so soon after the capture.

I have now stated the probative facts, so far as they are clearly established by the evidence. Where I have stated a fact as a fact, I consider it as clearly established, and so find the fact to be, and not open to question or doubt. On the other points, where there may be doubt, I have stated the salient points of the evidence as evidence, and the substance so far as it is deemed important *pro* and *con*, without attempting to refer to every minute circumstance.

The facts and testimony stated are the controlling facts and circumstances in the case. From the facts found and stated, and the evidence stated on the points open to question, the great controlling ultimate fact: was the opium in question smuggled into San Francisco on the steamer Tokio? must be determined.

It will be seen that there are two theories, and but two, suggested by the evidence and maintained by the opposing counsel. One is that the opium is Lai Yuen and Fook Loong opium, prepared at Hong
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Kong, out of crude Patna opium, and was smuggled into San Francisco on the steam-ship Tokio. The other is that it is domestic opium, prepared in the United States, and out of crude Turkish opium, 1,800 pounds of it at Newark, New Jersey, and 200 pounds of it at San Francisco, and that the claimant was attempting to smuggle it into the Sandwich islands on board the City of Sydney. One of these theories must be accepted as true, and the case decided on that principle; for, although it makes no difference on what vessel it was smuggled, if smuggled at all, the *testimony* does not indicate, or even suggest, that it was smuggled on any vessel other than the Tokio, and, if smuggled, that it is any other than Tai Yuen or Fook Loong opium, manufactured at Hong Kong out of Patna opium; and we are not at liberty to depart from the testimony and adopt some other theory or hypothesis not suggested or supported by the evidence. The question to be decided upon the facts and evidence stated, then, is, which one of these two theories is correct? for one or the other must, necessarily, be adopted. Was this opium smuggled into San Francisco on the Tokio? or was there an attempt to smuggle it into Honolulu on the Sydney?

At the outset of the discussion of the questions involved it is necessary to pass upon the admissibility of certain evidence, without which the government cannot possibly maintain this libel. The admission of the acts and statements of Henry Kennedy hereinbefore set out, performed and made soon after the capture of the opium while it was still lying on the wharf, is strenuously objected to on the part of the claimant as being utterly incompetent and inadmissible, on the ground that he is not a claimant, and it is not shown by any testimony, other than his own admissions, or otherwise than as appears by the foregoing, to be in any way connected with the transaction; that he is not shown to have any authority over the subject-matter, and the acts were not performed, or statements made, in the presence, or by the authority, or even with the knowledge, of the claimant, who testifies that he, and he alone, is the owner. It appears affirmatively, by the testimony of the officers who made the capture and arrest, that Henry Kennedy had no interview or communication with James K. Kennedy, claimant, and McDermot, or with either of them, after the capture and arrest, and before the statements and acts offered and objected to were performed and made. What transpired between him and the officers took place probably not far from one hour after the arrival of the captured boat at the Folsom-street wharf and the starting of Officer Smith to the station-house with the prisoner. It does not appear that Henry Kennedy was the man first seen by Egan; if he was, it is not apparent why he did not at once advance to meet Egan, when he found him alone, as he subsequently insisted upon seeing him alone. It may be that this evidence would be wholly incompetent on the trial of an indictment against James Kennedy and McDermot for smuggling this same opium, as being *res*

inter alios actæ; but, however that may be in this case, which is a proceeding *in rem* against the opium to condemn it, I think, upon the authorities cited by the United States attorney, these acts and declarations of Henry Kennedy, under the circumstances set out, are competent evidence, and admissible as a part of the *res gestæ*. I therefore overrule the objection and admit the evidence. The claimant duly excepts to the ruling, and the exception is allowed.

The letter of Goetz and the further note appended by Kennedy, set out in the preceding statement of facts, are also strenuously objected to as being no part of the *res gestæ*, they having been written two months and a half after the seizure and arrest, and whatever they may refer to or mean, they are statements respecting past transactions, and are incompetent and inadmissible. The note appended by James K. Kennedy to the letter of Goetz I think clearly admissible as a declaration of Kennedy himself against himself, the claimant of the opium, who himself testified that he alone is the owner. A party's own declarations are admissible in evidence against him, as such, whenever or wherever made, and without reference to whether they constitute a part of the *res gestæ* or not.

The letter of Goetz is on the same sheet of paper, and immediately preceding the appendage made by the claimant, and was left open expressly for Kennedy to read and make such additions as he saw fit; and Kennedy, having been informed of the fact, did read it and make the addition already considered. Both were doubtless intended for the same party, and had some relation to the same subject-matter. I consider, therefore, that Goetz's letter must be considered in precisely the same light as if it were a declaration of Goetz made in the presence of James K. Kennedy, without any comment made on his part, or with such comment as he saw fit to make. Such a declaration, made in his presence, would be admissible, and I think this letter, under the circumstances of the case, stands upon the same footing, and is admissible upon similar principles. As to the letter of Woo Ching, also set out in the statement of facts, I entertain more doubt. Goetz and Kennedy's letter, already considered, was inclosed in the same separate small envelope, and sealed up with this letter. They were, therefore, going to one address, and they were, doubtless, intended to be seen at least by the same party, and they seem to relate to the same transaction. Both this and Kennedy's postscript refer to the carpenter. Kennedy and Goetz both left their letter with the Chinaman, open, with an opportunity to read it, and intended it to be read, sealed up, and forwarded by him, the Chinaman, and they, with reference to these communications, were evidently acting in concert. It is true, Kennedy says he did not see this letter, or know of its contents, or that it was to be sent, and there is no direct evidence, or evidence other than the circumstance stated, to the contrary; but, upon the whole, though with some hesitation, I think it stands upon the same footing with Goetz's letter, and admissible.

To each of these rulings the claimant duly excepts, and the exception is allowed.

The letter of Lee Yue Wye was not in the same envelope with Goetz's and Kennedy's letter, but was a separate, independent letter, like a large number of others, from other parties to other parties, inclosed in one large outer package, a sort of small mail-bag by itself. The writer says the contents were written merely upon hearsay, without any knowledge of the facts upon his part or privity upon Kennedy's part. The claimant is not sufficiently connected with this letter to justify its admission, and it is, consequently, excluded from consideration; but, if admitted, it would add nothing of moment to the force and effect of the others. The observations of McDermot, made to the officer several days after the arrest, were no part of the *res gesta*, and as he is not a claimant, I exclude them. But they would add little to the force of the testimony, if in, and would not affect the result.

After mature consideration of the testimony and facts in all their aspects, I find it impossible to adopt either of the theories propounded as to the smuggling, and feel *entirely satisfied* that it is correct. Set aside the acts and statements of Henry Kennedy, the declarations made and alarm manifested by James K. Kennedy and McDermot at the time of the arrest, and the letters of Goetz, James Kennedy, and the Chinaman, and it must be conceded, I think, that the evidence would be overwhelming against the government. Even the acts of James Kennedy and McDermot, at the time of the capture, if they stood alone, would not be so specific and definite as to be necessarily inconsistent with claimant's theory. There is no direct, positive evidence, outside of these matters and acts referred to, and the inference to be drawn therefrom, to show that this opium ever was on the Tokio, and no established *other* fact, or direct reliable evidence of any fact, that is not just as consistent with the theory of the claimant that he was attempting to smuggle this opium to Honolulu on the Sydney as that it was smuggled into San Francisco on the Tokio; while the great mass of the direct testimony, whether reliable or not, is directly and positively opposed to and inconsistent with the latter, and as directly and positively supports the former. The boat containing the opium, when first discovered, was just where it would have been if, in fact, after having been loaded at the corner of Main street and the water front for the purpose as alleged, it had started to go to the Sydney to put the opium on board; and its subsequent movements were not inconsistent with that theory. No man testifies to having seen the boat in contact with the Tokio, or near enough to receive the opium, or in a condition to receive it from on board. No man testifies to having even seen any of this opium on the Tokio, or going off from it, although from five to seven men were constantly watching the ship night and day, and three additional experienced men searching her from time to time to find the drug. All these men

on watch, at the time the boat was discovered, together with the men on the prior watch, testify to their vigilance, and that they failed to see the boat in question, or any other, at the Tokio, or anybody carrying the opium off or putting it in the boat.

It is insisted by claimant that in the condition of the weather and the bay on that night it would have been impossible for so small a boat to lie along-side the steamer and receive so large an amount of goods. The bay was certainly rough. Such is the concurrent testimony of all. No expert gives an opinion as to whether it was practicable for a boat of the kind, in the condition of the sea, to lie along-side the steamer on the outside and take on board a ton of opium in the shape shown in the case.

I should myself, from the evidence, in view of the state of the bay, think it far more probable, if the opium was taken on board from the steamer on that night, that it was taken on board on the inside, between the steamer and the wharf, and not on the outside. But this involves the grossest negligence or complicity of a larger number of custom-house officers, for in that case all on watch must have been in such a position that the operation could not fail to have been brought to the notice of each. But, as there is no *direct* evidence as to its being taken on board from the ship at all, we can only infer which is most probable from the facts known. The improbability that this opium could have been taken off from the outside in the known condition of the bay, with the negligence, or complicity, of two watchmen, seems to my mind to outweigh the improbability of its being taken from the inside, even with the gross negligence or implication of all those whose duty it was to prevent it. The inside must have been certainly more practicable than the outside, and it only involves negligence or complicity of a greater number of men. If taken from the Tokio at all, I think it much more probable that it was done from the inside than from the outside. If there was complicity, then there must have been perjury also, and a great deal of it, for all of both watches and the searchers profess to have been vigilant, and to know nothing about the transaction. It is difficult to believe, and distressing to contemplate, the fact of so much official dishonesty or negligence, or both, as must have occurred if this opium came from the Tokio. Besides, there must also have been barefaced, unmitigated perjury on the part of numerous other witnesses. There undoubtedly seems to be difficulty in supposing that it was practicable to get this opium aboard the Sydney in this port, and off again at Honolulu; and the testimony upon the practicability of so doing is also in conflict. But the Sydney, at the wharf in San Francisco, was in smoother water than the Tokio, with no watchman except the single one employed by the ship; and the whole custom-house force at the port of Honolulu consisted of but 4 men, while in this port nearly or quite 40 in number, as shown by the testimony of a superior government custom-house officer, were engaged in the business

of watching the Tokio at one time or another, and not less than half a dozen at all times, and sometimes eight or ten at the same time.

The time is shorter, it is true, at Honolulu, but human nature can hardly be presumed to be much better there than elsewhere; and it is quite as likely to be practicable, in smoother water, with one watchman, and the aid of an acknowledged confederate on board of the Sydney, to elude the vigilance or corrupt the virtue of that one man at San Francisco, and of from one to four at Honolulu, as, with a rough sea prevailing, to elude the vigilance or to corrupt the virtue of the large number of the public guardians placed over the Tokio.

At Honolulu the price of opium, and consequently the inducement to violate the laws and take the risk, is much larger than at San Francisco. Then there is the direct, well-knitted, consistent, compact, concurrent, and homogeneous account given of the purchase of the 1,800 pounds of opium by James Kennedy, through Tai Hung & Co., of Hop Kee & Co., and 200 pounds of Tuck Kee; the putting of it up in small boxes; labeling it with new labels in imitation of Hong Kong labels but different in type and color, with "San Francisco" as a private mark stamped on the under and concealed side of each label found to exist as stated by Choy Lum in his testimony, with a character imprinted on the outer tins with steel dies different from the genuine, supported by a production of what would seem to be the dies, stamps, and wood engravings used to produce them; the packing and soldering up of the small boxes in larger, containing newspapers of dates so late that it must have been done since the arrival of the steamer in San Francisco; the transportation of the opium from 1014 Dupont street to Main street, and loading in the boat, etc.,—all this supported by the direct, positive testimony of so many witnesses as to their own personal acts in the premises. All this testimony, taken in connection with the remarkable success of the tests of the character of the opium tending to show it to be of domestic manufacture, and the fact that it contains the percentage of morphia that exists in the domestic article; the established fact that Hop Kee had an opium manufactory at Newark, New Jersey, prior to 1880, and afterwards at San Francisco, and received 2,000 pounds of prepared opium from the former so late as February 24, 1880; and the testimony that the firm then had 6,000 pounds, before received, on hand, besides the difficulty of so concealing and manipulating so large an amount of opium on the Tokio as to give the external appearance it presented at the time of the seizure, and the other facts favorable to the claimant, set out in the statement,—makes a very strong, not to say overwhelming case, when standing by itself.

On the other hand, the government insists that the facts and evidence set out in the statement disclose a body of men systematically engaged in smuggling opium; that the direct evidence as to the purchase, packing, stamping, etc., comes from the very men engaged in this unlawful business, who are largely interested pecuniarily, and

some of them criminally, and it is therefore to be distrusted on those grounds; that parties systematically engaged in smuggling opium, as they admit, to Honolulu, are capable of smuggling into San Francisco, and of defending and concealing their smuggling by the grossest perjury; that the watchmen, searchers, etc., are implicated with them; that all this business of packing, labeling, stamping, dies, etc., except in regard to soldering up the smaller boxes in the larger tins, containing the newspapers, and subsequent packing in mats, could have been done, and—although there is no direct evidence of it—was pre-arranged and accomplished, in China before coming on the steamer, or during the passage,—the dies, engravings, private marks, labels, etc., having been prepared for the occasion; and that the soldering up and packing in mats could have been done, and was done, with the connivance of the searchers and inspectors on the steamer, during the nine days while she lay at the wharf in San Francisco; that the purchase of the opium from Hop Kee and Tuck Kee, packing, stamping, etc., on Dupont street, is an after-thought of the claimant and those engaged in smuggling with him, who are claimed to be thoroughly experienced and skilled in the business,—no such position having been taken or suggested, or evidence of the kind given, in the district court, although Loo Cho Tong, the senior member of the firm of Hop Kee & Co., and Choy Suey were examined as a witness on other points; that it was impracticable to get the opium on the Sydney here and off at Honolulu, and it is therefore improbable that it should be attempted; that it is inconceivable, if the theory of the claimant is true, that he should have failed, in the district court, with the means at hand, to prove the facts now testified to by Kennedy, Choy Lum, Choy Suey, Loo Gee Wing, Tuck Kee, Wy Noon, and McDermot, since they clearly constitute far the most important part of the claimant's case; and that it is impossible to reconcile with the truth of the claimant's theory, or with any theory except that of the government, the conduct, acts, and declarations of Henry Kennedy, the steerage steward of the Tokio, and brother of the claimant, James Kennedy, who was on the watch at the unseasonable hour of the seizure, and who, notwithstanding the interest then manifested by him, has not since appeared at the trial in either court, where his evidence would have been of the highest importance, or the conduct and statements made, and the fears manifested by McDermot and the claimant, James Kennedy, at the time of the arrest, especially when considered in connection with the letters of Goetz, Kennedy, and Woo Ching, in evidence. Some of these suggestions, and especially the fact that the parties were actually engaged in smuggling somewhere; the failure to produce so much valuable evidence on the first trial; the suggestions relating to the action of the two Kennedys, McDermot, Goetz, and Woo Ching, under the circumstances,—are weighty, and entitled to great consideration.

In view of the established facts and the evidence on questionable

points indicated, I am satisfied that the finding on the controlling issue of fact must be determined by the rule of law to be adopted as to where the burden of proof lies, and as to the amount of evidence necessary to control the finding.

Undoubtedly the government introduced ample testimony in the first instance to show probable cause. This being so, under section 909 of the Revised Statutes of the United States, and the numerous decisions upon the statute cited, the burden of proof is thrown upon the claimant to show the innocence of the transaction. This point is conceded, and the claimant assumed that burden, and he now earnestly insists that he has fully discharged the burden, and fully, by affirmative evidence, overthrown the case of the government within the requirements of the law. But a further question arises. The burden of proof being on the claimant, what amount of proof is necessary to discharge that burden and relieve the claimant of the forfeiture? The United States attorney earnestly insists that the claimant is bound to affirmatively show the innocence of the transaction *beyond a reasonable doubt*, contrary to the rule of the criminal law, that innocence is presumed till the contrary is proved, and contrary to the rule that the government must affirmatively show the guilt of the accused beyond a reasonable doubt; and he cites, among other authorities, *The Short Staple*, 1 Gall. 107, in which Judge STORY remarks: "The *onus probandi* rests on him, (the claimant,) and a forfeiture must be pronounced, unless he brings the defense *clear of any reasonable doubt*." This position is as earnestly controverted by the claimant. If the rule is as insisted on by the government in this particular,—although claimant's counsel maintains a contrary view,—I think the claimant has failed to show the innocence of the transaction beyond a reasonable doubt, and the opium must be condemned. But conceding the rule not to be so rigid as is claimed by the government, the claimant takes another and intermediate position, which, if adopted, would control the case, and its decision will control my finding and decree.

The rule insisted on is that the burden of proof being on the claimant, yet when the proof is all in, no matter from which side it came, the guilt of the parties concerned, upon the whole evidence actually before the court, must affirmatively appear, beyond a reasonable doubt, as in criminal cases, or the goods cannot be condemned; that it is not enough, as in ordinary civil cases, between man and man, that there is a mere preponderance of evidence in favor of guilt. This rule was also combated with great vehemence by the United States attorney, as presenting the turning point in the case, and he frankly, distinctly, and emphatically stated at the argument, and I think correctly and properly, that if the rule, as claimed by him, was rejected, and this rule, as insisted upon by claimant, adopted by the court, the government could not, under the evidence, maintain its case, and there would be no possible use in spending any more time in discuss-

ing the voluminous evidence. The authorities are not in harmony upon questions of this kind, some holding that always, in a civil case, in form, even though involving penalties and questions criminal in character, the ordinary rule in civil cases prevails, that the verdict or finding is to be determined by a mere preponderance of evidence. Others hold that where the acts constituting the ground of action upon which a recovery is sought, constitute a criminal offense, so that it is necessary to prove the offense, in order to recover, the offense must be affirmatively shown by the evidence beyond a reasonable doubt, and that a mere preponderance of evidence is insufficient.

In this case the opium must be condemned, if at all, under section 3082, Rev. St., which provides:

"If any person shall fraudulently or knowingly import or bring into the United States * * * any merchandise, * * * contrary to law, * * * such merchandise shall be forfeited, and the offender shall be fined in a sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both."

If, on an indictment for smuggling, under this section, any party should be on trial, the question, as it is in this case, being, not whether he was in possession of the goods, but whether he imported them contrary to law, he could not be convicted unless the evidence should affirmatively show, beyond a reasonable doubt, that he was guilty. The forfeiture of the goods is provided for in the same section as the fine and imprisonment, and it is insisted that the forfeiture is as much and as clearly a part of the punishment for the offense committed—inflicted upon the owner of the goods, whoever he may be—as the fine imposed by the same section. The goods are his, as much so as his money; and it is argued that to take from him his goods, because he has violated the law, is as clearly a punishment as to take his other money for the same reason; and there is no limit to the amount and value of the goods forfeited, while the additional fine is limited to \$5,000.

In this case, the property claimed to be forfeited is said by the United States attorney to be of the value of from \$20,000 to \$25,000, and this part of the punishment is therefore four or five times as large as that part which can be inflicted in the form of a fine. They are both, it is claimed, but parts of the punishment inflicted by the statute, the only difference being the form in which the conviction is had and the punishment inflicted: one being prosecuted against the goods as the formal party to the record, and in the form of a civil proceeding, and the other against the owner, or the party unlawfully importing the goods, as the formal party, in the form of a criminal proceeding; that only the form is different. In substance and effect the result is said to be exactly the same so far as it affects the rights of the owner, both resulting in punishing the owner to the extent of the value of the property or money taken from him, both being alike a penalty or amercement.

It is therefore insisted that the rule as to the amount of evidence necessary to condemn in the one case and convict in the other, and inflict the punishments prescribed,—which are, in substance and all essentials, alike,—must be the same. I confess there is great force in these positions, and that it is not easy to perceive any reason, which rests upon a sound basis, for making any distinction. If the criminal rule is good as to one part of a punishment, why not as to the other? No matter through what channel, or in what form, a like substantial result is reached. A criminal offense committed is the basis of the proceeding and ground of punishment, alike, in the indictment, and of forfeiture and condemnation on the information, and the same offense must be shown in order to maintain either proceeding. Then, it is plausibly asked, why not required to be proved by the same quantity of evidence, both culminating, not in establishing a mere civil right, but also in the infliction of a punishment for the crime committed? It is well suggested that there may be good ground for a distinction where the form of the action is not only civil, but the end is to establish a mere civil right, and not to punish in part for a crime. As in a civil suit for damages by the sufferer from an assault and battery, the rule may well be different from that in an indictment against the perpetrator for the same offense committed against the laws.

Upon the question now under investigation, not only the authorities in the state courts, but in the courts of the United States, not even excepting the decisions of the supreme court, appear to me to be at variance. *U. S. v. The Burdett*, 9 Pet. 690, was an information in admiralty to forfeit the brig, appraised at \$8,000, for a breach of the revenue laws. In discussing the case, the supreme court, by Mr. Justice McLEAN, states the rule applicable to the case thus:

"The object of the prosecution against the Burdett is to enforce a forfeiture of the vessel, and all that pertains to it, for a violation of a revenue law. This prosecution, then, is a highly penal one, and the penalty should not be inflicted unless the infractions of the law shall be established beyond reasonable doubt. That frauds are frequently practiced under the revenue laws cannot be doubted, and that individuals who practice the frauds are exceedingly ingenious in resorting to various subterfuges to avoid detection is equally notorious. But such facts cannot alter the established rules of evidence, which have been adopted as well with reference to the protection of the innocent as the punishment of the guilty."

And the rule is again repeated on page 691 in the following language:

"No individual should be punished for a violation of law, which inflicts a forfeiture of property, unless the offense shall be established beyond a reasonable doubt. This is the rule which governs a jury in all criminal prosecutions, and the rule is no less proper for the government of the court when exercising a maritime jurisdiction."

In this case, as in that, which was also an information in admiralty *in rem*, it is sought to punish the claimant "for a violation of the law which inflicts a forfeiture of property"—and a large amount of prop-

erty—as a part of the penalty for the offense. If the rule in criminal cases was proper in that case, when the court was “exercising a maritime jurisdiction,” why not in this case, it is asked, when exercising a similar jurisdiction?

The rule in criminal cases seems to be recognized in suits for penalties and forfeitures in *Chaffee v. U. S.* 18 Wall. 517. The fourth head-note substantially states one of the points decided to be “that in an action for penalties for alleged frauds upon the revenue * * * the burden rests upon the government to make out its case *beyond a reasonable doubt*.” But in *Lilienthal's Tobacco v. U. S.* 97 U. S. 237, a later case than either of those cited, the supreme court appears to me to lay down the rule in cases of information *in rem* as it exists in civil causes, as to the amount of proof. This is distinctly done on pages 266, 267. And it is distinctly repeated on page 271, where the court says:

“Suggestion was made during the argument at the bar that the court erred in not instructing the jury that they could not find that the property was forfeited, unless the matters charged were proved beyond a reasonable doubt; but no such exception was taken at the trial, nor is any such complaint set forth in the assignment of errors, nor is there anything in the case of *Chaffee v. U. S.* 18 Wall. 516, which conflicts in the least with the views here expressed, as is obvious from the fact that the two cases are *radically different*, the present being an information against the property, and the former an action against the person to recover a statutory penalty. Informations *in rem* against property differ widely from an action against the person to recover a penalty imposed to punish the offender. But they differ even more widely in the course of the trial than in the intrinsic nature of the remedy to be enforced.”

The court also distinguishes it from the other case cited, though it seems to me that the distinction is not very broad. I regard this case as giving the last expression of the views of the supreme court, and as controlling in this court in this case; also as adopting, in a civil case in form, by information against the goods to enforce a forfeiture, notwithstanding it is essentially criminal and intended to punish a crime, the ordinary rule that a mere preponderance of evidence should determine the finding of a court or verdict of a jury. One rule or the other, either that in civil or that in criminal cases, must be applicable. So far as I am aware no intermediate rule depending on degrees in doubt, or certainly between proof by a mere preponderance of evidence and proof beyond a reasonable doubt, has ever been suggested in the authorities. Any intermediate rule would be difficult of application, if not wholly impracticable. The present case will afford the supreme court an opportunity to review the question, if desired, and to lay down the rule definitely, and draw the line sharply, so as to be beyond further question, for the future guidance of the subordinate courts. There is some ground for believing that the cases cited went off on the special circumstances of the respective cases rather than on strict rules of law. The question, in its various

phases, was discussed and authorities examined in an article entitled "Some Rules of Evidence," in 10 Amer. Law Rev. 642, for the year 1876. See, also, *Welch v. Jugenheimer*, 25 Alb. Law J. 271; S. C. 56 Iowa, 11; S. C. 8 N. W. Rep. 673. For the purposes of this case, therefore, in accordance with what I conceive to be the authoritative rule laid down by the supreme court in its latest decisions, I shall apply the rule in ordinary civil cases, that a mere preponderance of evidence in favor of guilt must determine the controlling question of fact as to whether the opium was smuggled into San Francisco on the Tokio or not.

After as careful and dispassionate a consideration of all the facts and evidence in this case as I am capable of giving it, if I were required to determine the title to the property between two citizens, upon precisely the same case, I should say, but with considerable hesitation, that, upon the whole, the preponderance of evidence is in favor of guilt in the transaction. Adopting the same rule as to the quantity of evidence requisite, while the point is not, in my mind, free from serious doubt, I find that the opium in question was smuggled into the port of San Francisco on the steam-ship City of Tokio, and that it was so smuggled with the actual intent to defraud the United States.

I think no unprejudiced mind can carefully consider the testimony in this case and say that it can adopt either theory of the case presented, as to whether the opium was smuggled into San Francisco on the Tokio, or attempted to be smuggled out on the Sydney, and rest with entire satisfaction and confidence in the conviction of the correctness of his determination. There must be some doubt, a reasonable doubt, not a mere fanciful doubt resting upon hypothesis alone, unsupported by evidence, but a doubt suggested by fairly arising out of, and resting upon, substantial evidence. In reaching this result, of course, much direct, positive testimony must be rejected as incredible under all the circumstances surrounding the case.

As the findings of this court, upon the mere weight of evidence, cannot now be reviewed by the supreme court unless some rule of law has been violated, the claimant is entitled to have the principle of law by which I am guided, stated, so that my ruling in that particular may be corrected, and the finding on that ground set aside, if I prove to have been in error. I therefore state the rule adopted, and which controls the finding. If I am wrong in the rule applied, then the finding should be set aside, and a finding in favor of the claimant adopted. The claimant objected to the rule adopted, and he duly excepts to the action of the court in that particular, and the exception is allowed.

So, also, the evidence of the acts and declarations of Henry Kennedy, soon after the capture of the boat and arrest of claimant and McDermot, and the letter of Goetz, with the addition or postscript by James K. Kennedy, and the letter of Woo Ching, found in the same envelope with the letter of Goetz, were admitted and considered

by the court, under objection to the admission of each, and due exception taken by the claimant.

All this evidence so admitted, including the said acts of Henry Kennedy and said letters, were not only admitted and considered, but great importance was attached to it all. These acts were regarded as wholly inconsistent with claimant's theory of the case, and irreconcilable with much of claimant's direct evidence. It was the preponderating evidence in the case, without which the finding must necessarily have been clearly and beyond reasonable doubt the other way. If, therefore, this testimony was erroneously admitted, the finding should be set aside as having been founded on improper evidence, and a finding for claimant substituted. I state this fact in order that the claimant may have an opportunity to have my action in the premises reviewed, and if erroneous corrected.

I have taken pains to state the entire substance of the evidence upon the doubtful points, in order that the supreme court, on appeal, may see the case, in all its bearings, precisely as it appears to me.

As a conclusion of law, from the ultimate fact as found on the controlling issue, I find that there must be a decree for the government, condemning the opium as forfeited; and it is so ordered.

CELLULOID MANUF'G CO. v. CHROLITHION COLLAR & CUFF CO.

(Circuit Court, S. D. New York. April 3, 1885.)

1. PATENTS FOR INVENTIONS—CELLULOID COLLARS AND CUFFS—INVENTION—INFRINGEMENT.

Letters patent No. 200,939, granted to Rufus H. Sanborn, Charles O. Kanouse, and Albert A. Sanborn, March 5, 1878, for a new and improved fabric for collars and cuffs, *held*, not void for want of novelty and invention, and infringed by use of such fabric by defendants around the button-holes and edges of the collars and cuffs made by them.

2. SAME—WHAT CONSTITUTES INFRINGEMENT.

Where there is a valid patent for a fabric, any one who uses the fabric without a license is an infringer; and it is no defense to urge that he might have used more, or that he uses less than the patentee in making similar articles. If he uses any of the fabric he uses enough to make him an infringer.

In Equity.

William D. Shipman, Frederic H. Betts, and J. E. Hindon Hyde,
for complainants.

Edwin M. Felt and John P. Adams, for defendants.

COXE, J. The complainants are the owners of letters patent No. 200,939, granted to Rufus H. Sanborn, Charles O. Kanouse, and Albert A. Sanborn, March 5, 1878, for a new and improved fabric for collars and cuffs. In the specification the inventors declare:

"The object of our invention is to make an improvement in collars and cuffs, and like articles of wear, which may be worn a long time without soil-

ing, and be easily renovated for continued wear, by producing them of celluloid or other forms of pyroxyline or soluble material of like nature, and a textile or fibrous fabric, in the manner following:

"The celluloid, A, is prepared in thin sheets, and between two sheets is placed a sheet of muslin, or other textile fabric, B, to give increased body, elasticity, and strength to the whole; or, in place of the textile material a substance of the nature of paper may be used, and the same end be answered.

"The union of the celluloid and the inner substance may be effected, as above shown, in sheets, and the articles of wear be cut from this united sheet and fitted for use; or the articles of wear may be cut from the separate sheets, and the three be put together afterwards; and whenever united, the parts together are submitted to suitable pressure for thoroughly incorporating them into one body. In this way collars, cuffs, shirt-fronts, or neck-ties, etc., may be made durable, and of a material sufficiently elastic, and easily kept clean, for the surface may be washed the same as earthenware."

The claim is as follows:

"A fabric for collars and cuffs, or other similar articles, having outer sheets or layers of celluloid and an interlining of textile or fibrous material, substantially as and for the purposes specified."

The defenses are lack of novelty and invention and non-infringement. Prior to the patent the great utility and importance of a cheap and durable material for collars and cuffs, which should have the appearance of linen, and at the same time be capable of continuous wear without washing and ironing, had long been recognized. To supply this want had been the aim and object of a host of inventors. The problem which confronted them was by no means easy of solution. The whole material universe was searched, and a great variety of fabrics and combinations of fabrics were adopted, but still no practical result was attained. Always some important requisite was lacking. At length the discovery of celluloid and other pyroxyline compounds offered, apparently, a solution of the difficulty. Many experiments were made, but the complainants' assignors were the first, so far as this record discloses, to embody in tangible and practical form the idea which had, perhaps, vaguely floated through the minds of others. All before their invention was tentative, impracticable, visionary. They have produced the required fabric,—a fabric having durability, elasticity and lightness, easily cleansed, inexpensive, and of the proper thickness and color. A fabric, in short, which possesses many of the characteristics of linen, and, when made into collars and cuffs, enables the wearer to dispense with the services of the launderer. No one had previously combined all these advantages or any considerable part of them. The novelty of the invention is not negated by any of the patents, American or foreign, introduced by the defendants. They all deal with pyroxyline in a liquid or semi-fluid form, as a paint, as a coating, and not in the solid form used by the complainants. In some of these patents, the inventors state generally that the compound produced by them may be used upon collars and cuffs and other textile materials. They knew, many of them, what was wanted, but they did not know how

to produce it. No one describes with anything like the required accuracy the fabric of the complainants. The burden is upon the defendants to satisfy the court that the prior descriptions contain such a clear, full, and exact statement that a person skilled in the art, with the statement before him, could produce the fabric in question. Not only have the defendants failed in this, but the proof, from the experts as well as from those in the employ of the defendants themselves, is positive and affirmative that the information derived from the prior patents, singly or combined, will not produce a material of the least practical value for collars and cuffs. Liquid pyroxyline cannot, upon this proof, be utilized for such purpose. The law requires something beyond mere suggestion to defeat a patent. Prophecy will not do it. Facts not theories are needed. The conclusion is reached, therefore, that the inventive faculty, and not mechanical skill alone, was required to produce the invention described in the complainants' patent, and that the patent is valid.

Upon the question of infringement there is more difficulty. Upon a cursory examination of the defendants' collars and cuffs, and the evidence relating to the manner of their manufacture, the court might hesitate to declare infringement, but as the inquiry proceeds the more deep seated becomes the conviction that the complainants' rights are encroached upon.

The defendants cut a single sheet of chrolithion, which is a substance essentially the same as celluloid, into the desired shape, but larger than the finished article. A narrow strip of textile or fibrous material is placed around the four edges, which are then folded over, and by heat and pressure made to adhere. The button-holes are strengthened in substantially the same manner. Thus it will be seen that at the seam or outer edge, where increased strength, body, and elasticity are most important, where the principal strain comes, and where the liability to tear and crack is greatest, the invention of the complainants is unquestionably adopted. At these points the defendants use a fabric having outer layers of celluloid and an interlining of textile material. In considering this question it should be remembered that the invention is not for a collar or cuff, but for a fabric. The defendants do not use the fabric for the interior portion of their cuff, but they do use it at the edges and around the button-holes. The contention seems to be that they do not infringe because they do not use as much of the complainants' fabric as the complainants do. The inquiry is, *first*, do the defendants, at the edge and around the button-holes of their collars and cuffs, use a fabric? and, *second*, do they use the fabric claimed in the complainants' patent? If they do, then, *pro tanto*, they are infringers. The testimony upon this subject is quite convincing that there has been a studied effort on the part of the defendants, from the first, to appropriate all the benefits of the complainants' invention, and avoid paying tribute by cleverly devised but insubstantial variations. The defendants might, it is true, have

made their collars and cuffs entirely of the patented material, but where there is a valid patent for a fabric, any one who uses the fabric without license is an infringer; and it is no defense to urge that he might have used more, or that he uses less than the patentee in the manufacture of similar articles. If he uses any of the fabric he uses enough to make him an infringer.

There should be a decree for the complainants.

FOSTER v. CROSSIN and others. (Two Cases.)

(Circuit Court, D. Rhode Island. April 6, 1885.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT OF RECENT PATENT—VALIDITY—PRELIMINARY INJUNCTION.

When the validity of a recent patent has not been judicially decided, a preliminary injunction may, nevertheless, be granted in a clear case of infringement.

2. SAME—DESIGN PATENT FOR JEWELRY—NOVELTY.

Design patents No. 15,049 and 15,050, for designs for jewelry pins, held not void for want of patentable novelty.

Motion for Preliminary Injunction.

W. B. Vincent, for complainant.

J. M. Brennan and *W. R. Perce*, for respondents.

CARPENTER, J. These bills pray an injunction to restrain the respondents from infringing letters patent, granted to the complainant June 10, 1884, for designs for jewelry pins, and numbered 15,049 and 15,050, respectively. The complainant now moves for a preliminary injunction. The respondents, in the first place, object that the patents are recent, and have not been found by any judicial decree to be valid; and they contend that in such case the court will not look further, but will hold that the complainant must fail for want of a judicial decision establishing the patents, or such a lapse of time—accompanied with the general acquiescence of the public—as may raise an equivalent presumption in favor of his right to recover on final hearing.

There are cases in which the judges have guided their discretion by this rule. Some of them are collected in Bump, Patents, p. 289, § 4921. The following cases to the same effect are cited by the respondents: *White v. S. Harris & Sons Manuf'g Co.* 5 Ban. & A. 571; S. C. 3 FED. REP. 161; *Warner v. Bassett*, 19 Blatchf. 145; S. C. 7 FED. REP. 468; *Jones v. Hodges*, Holmes, 37; *Fales v. Wentworth*, Id. 96; *Jones v. Field*, 12 Blatchf. 494; *Cross v. Livermore*, 9 FED. REP. 607; *Bradley & Hubbard Manuf'g Co. v. Charles Parker Co.* 17 FED. REP. 240. In all these cases it is to be noted, however, that there were other grounds for denying the motion besides that on which the

respondents here rely; and I think very few cases will be found in which an injunction has been refused solely on the ground here urged.

Undoubtedly, the production of the patent alone can in no case raise a presumption in favor of the patentee sufficient to justify the order of a preliminary injunction; and it is, perhaps, usually true that the most satisfactory basis for finding such a presumption will be in a judicial decision or in long uninterrupted use. But I am not prepared to say that the presumption can arise in no other way. It is true that a rule will be found laid down in many cases in terms which, taken by themselves, are broad enough to support the contention of the respondents; but it is also true that in many, if not most, of these cases the rule is stated more broadly than is necessary to the decision. I do not think the present current of decision tends to the establishment of a pointed rule such as is here claimed by the respondents. *New York Grape Sugar Co. v. American Grape Sugar Co.* 20 Blatchf. 386; S. C. 10 FED. REP. 835; *Steam-gauge & Lantern Co. v. Miller*, 8 FED. REP. 314.

I proceed, therefore, to consider whether the complainant has, on this motion, shown such a case as raises a clear presumption that he will be entitled to a decree on final hearing. Infringement is sufficiently proved, and, indeed, is not denied; but the respondents strenuously contend that the patents are void for want of patentable novelty. The distinctive feature of the design is fully stated in the claims of the patents. The claim of No. 15,049 is as follows:

"The design for a jewelry pin herein shown and described, the same consisting of a plate having the shape of a spoon, with the outline edge of the plate turned backward at a nearly uniform distance from its front, and the surface of the handle of the spoon showing an embossed or engraved ornamentation."

The claim of No. 15,050 is the same, with the substitution of the word "table-fork" for the word "spoon." The main feature of the design is described in the words, "with the outline edge of the plate turned backward at a nearly uniform distance from its front." It is suggested that this clause of the claim relates to the method of manufacture, rather than to the design of the finished product, and therefore cannot be sustained in a design patent; but I think the reading of the whole claim shows the true meaning to be that the design claimed consists, not in the method of construction, but in the peculiar rounded and finished form of the edge, like that of a table-spoon, which peculiar form necessarily results from the turning down of the edge of the plate, and is most clearly described by reference to the process of manufacture which produces it. The question, then, is whether this design is new and sufficiently distinctive to be patentable. The respondents read the affidavits of several persons, who testify that they have seen for sale in the market, at various times from July, 1880, down to the present time, jewelry pins made in the form of spoons and forks. Three examples of such pins are produced in evidence.

One of them is distinctly identified as a "specimen" of those sold by the affiant in the year 1881. The others are very imperfectly, if at all, identified as having been actually sold or made for sale, but they are stated by the witnesses to be similar to those which they have seen on sale. All these pins show embossed or engraved ornamentation, but they are all so made that there is a distinctly perceptible angle between the front and the edge of the spoon or fork which forms the pin.

Although the testimony by which these exhibits are verified is not of the most satisfactory kind, nevertheless, if the exhibits were exactly similar to the pins described in the patent, I should be unwilling to order an injunction. It is, therefore, necessary for the complainant to maintain the proposition that the rounded and smoothly-finished edge constitutes such a distinctive feature of the design as will support the patents.

Much light, as it seems to me, is thrown on this question by the affidavits read by the complainant. Seven witnesses, who have been engaged in the jewelry business in New York and Providence for different spaces of time, from 15 to 28 years, testify that so far as they know the pins made by the complainant, according to his design, were the first pins of that description known to the jewelry trade; that they were recognized by the trade as an original design; that the peculiar shape given to the edge by turning back the plate is distinctive and easily observed; that pins made with this shape are readily distinguished from those made like the exhibits produced by the respondents; and that the pins made by the complainant under his patents are in large demand, and have been, as affiants are informed, extensively copied by other persons. There are, indeed, affidavits produced by respondents in which the witnesses, who are in the jewelry trade and are apparently equally well able to judge of the matter, give their opinion that there is no substantial difference in design between the pins made by complainant and those which have formerly been sold. It seems to me, however, to be plain that the distinctive feature invented by the complainant, slight though it be, has been sufficient to create a large demand for the article in question, where there was before, to say the best of it, but a small demand. In view of the affidavits produced by the complainants, I can hardly believe that pins of the fork and spoon design have been generally sold in the jewelry trade before they were introduced by the complainant. Design, of course, relates solely to the appearance of the article to the ordinary purchaser; and, when the question is whether a difference of design be substantial and valuable, surely there can be no test better than the practical test which is furnished by observing the effect of the two designs on the appreciating observation of the purchasing public. I conclude that in this case the design is sufficiently distinctive to support the patents.

Some evidence has been introduced on both sides on the question

whether the complainant be the first inventor of the turned-over edge as applied to jewelry pins. On this point I do not think it necessary to say anything, except that I am clearly satisfied that the complainant is the first inventor.

Let a decree be entered, enjoining the respondents as prayed.

THE G. REUSENS.¹

(District Court, S. D. New York. March 5, 1885.)

1. POSSESSION—JURISDICTION.

In possessory actions a court of admiralty will not take cognizance of or enforce a merely equitable right as against the legal title of a defendant in possession; although it may decline, in its discretion, to enforce even a legal title, as against a meritorious equitable title accompanied by possession, or may give redress against a maritime tort upon an equitable vendee in possession.

2. SAME—TITLE TO VESSEL—SHERIFF'S SALE—SECRET TRUST—CASE STATED.

The libellant B. claimed title to nineteen thirty-seconds of the bark G. R., under a sheriff's sale on an execution issued out of a state court on a judgment against one C. He also claimed that possession was wrongfully withheld from him by R., master of the bark, and filed this libel against the bark, and against R. and C. to obtain possession. R. appeared and denied the libellant's title; showed that he had possession of the bark, and exhibited a complete paper title in himself to twenty-six thirty-seconds, including the nineteen thirty-seconds claimed by libellant. Thereupon the libellant offered to prove that at the time of the sheriff's sale under the execution and during the year preceding, the defendant R. held the nineteen thirty-seconds of the bark sold on execution upon a secret trust for the benefit of C.; also that C. had bought the nineteen thirty-seconds with his own money, and had caused the title to be taken in the name of R. in order to avoid the claims of C.'s creditors. *Held*, that as C., a judgment debtor, never had a legal title or possession, a sheriff's sale upon execution against him did not of itself make a legal title in the vendee. Before such a title could be recognized as a legal one, there must be established some secret trust in the holder of the legal title for the benefit of the judgment debtor that is fraudulent as against creditors. Whether such a secret trust and fraud existed in this case were the only questions herein litigated. *Held*, that such a matter is not a proper subject of inquiry in an admiralty court; and the libel must be dismissed for want of jurisdiction.

3. SAME—THE YACHT AMELIA.

The decision of JOHNSON, J., in the case of *The Amelia*, affirming 6 Ben. 475, and unreported elsewhere, appended.

In Admiralty.

Goodrich, Deady & Platt and *J. Warren Coulston*, for libellants.

Benedict, Taft & Benedict, for claimants.

BROWN, J. This libel was filed to recover possession of the bark G. Reusens by the libellant, as the alleged owner of nineteen thirty-seconds. The defendant Risley, who is master and in possession, claims to be the owner of twenty-six thirty-seconds, including the nineteen thirty-seconds claimed by the libellant.

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

The title of the libelant was made through a certificate and bill of sale, executed by the sheriff in pursuance of a sale under execution in a state court upon a judgment against one A. D. Conover, recovered on the twenty-second of October, 1883. The libelant upon the trial having offered in evidence proof of this judgment, of the execution issued upon it to the sheriff, of the sale under the execution in February, 1885, of nineteen thirty-seconds of this vessel to the libelant, and of the bill of sale executed to him by the sheriff, thereupon proceeded to give certain evidence, and offered other evidence tending to show that at the time of the sale under the execution, and during the year preceding, the defendant Risley held nineteen thirty-seconds of the bark upon a secret trust for the benefit of Conover; that Conover had negotiated for the purchase of these nineteen thirty-seconds in 1882; had paid the purchase price therefor with his own money, and had caused the title to be taken in the name of Risley for the purpose of avoiding the claims of C.'s creditors; that Risley had verbally acknowledged Conover's interest in the vessel, and had executed a bill of sale of these nineteen thirty-seconds at Conover's request, the name of the vendee being left in blank. Objection being made to the competency of this evidence in a possessory action in this court, the question, upon these offers of testimony, was submitted to the decision of the court whether it would entertain jurisdiction of such a litigation.

It is well settled, as a general rule, that in possessory actions a court of admiralty will not take cognizance of or enforce a merely equitable right as against the legal title of a defendant in possession; although it may decline, in its discretion, to enforce even a legal title, as against a meritorious equitable title accompanied by possession, or may give redress against a maritime tort committed against an equitable vendee in possession. Most of the American authorities on this question are cited in the case of *Wenberg v. A Cargo of Mineral Phosphate*, 15 FED. REP. 285, 287, 288. See, also, *The Dauntless*, 7 FED. REP. 366, and 19 FED. REP. 798; *The John Jay*, 3 Blatchf. 69; *The Clarissa Ann*, 2 Hughes, 89, 90; Abb. Shipp. *103, note a.

Counsel for the libelants seek to distinguish the present case from most of the cases referred to, in which the court refused to enforce a mere equitable title as against the holder of the legal title in possession, on the ground that here, through the sheriff's certificate and bill of sale, the libelants present a legal title. But it is plain that where the judgment debtor has never had the legal title or the possession, the sheriff's sale upon execution against him does not of itself make a legal title in the vendee. Before such a title can be recognized as a legal one, there must be established some secret trust in the holder of the legal title for the benefit of the judgment debtor that is fraudulent as against creditors. Otherwise, *prima facie* legal titles might be multiplied *ad infinitum*, through sheriffs' sales upon judgments that were against entire strangers to the property. Had

such a legal adjudication been had prior to the filing of this libel, that adjudication, together with the sheriff's bill of sale, would have presented a legal title proper to be enforced in the admiralty. In this case no such adjudication has been had. And the court is called upon in this action to investigate that question, and to find a secret trust and fraud against creditors, as between Conover, a judgment debtor, and Risley, who all along has been in actual possession, and had the apparent legal title. This is, in fact, the single subject of litigation. The object of the suit is the same as that of a bill in equity for relief against a secret trust and a fraud against creditors. This is precisely such a bill as STORY, J., says, in *Andrews v. Essex, etc.*, 3 Mason, 6, 16, should not be entertained in the admiralty. There is no reason in this case to depart from this established rule. The transactions involved in the inquiry have no reference to maritime affairs, except the accidental circumstance that the property which is the subject of the alleged secret trust and fraud against creditors is a vessel. The purchaser at the sheriff's sale, having never acquired possession, must rely upon his remedies at common law or in equity to establish and perfect his right, if he has any.

This court cannot be made the mere instrument of enforcing the collection of debts against fraudulent judgment debtors by means of a suit like this, which is practically a bill in equity in aid of a purchaser under an execution. Such a proceeding is not only wholly foreign to the objects of an admiralty court, but is unnecessary as a legal proceeding. The rules applicable to the sales of part interests in ships are in general those that apply to other tenants in common. *The Two Marys*, 10 FED. REP. 919, 923. A sheriff selling such part interests upon execution is authorized to take possession of the whole property, and to deliver the whole to the purchaser. *Mersereau v. Norton*, 15 Johns. 179; *Phillips v. Cook*, 24 Wend. 389, 396; *Waddell v. Cook*, 2 Hill, 47, 49, note; *Smith v. Orser*, 42 N. Y. 132; *Atkins v. Saxton*, 77 N. Y. 195. In selling against a judgment debtor not holding the apparent title, he may require full indemnity before proceeding; and lawful owners, whose possession is disturbed by the sheriff, may look to him and to his indemnitors for satisfaction. It is even doubtful whether a sale by the sheriff without thus exercising his lawful dominion over the property sold should be sustained as valid. *Read v. McLanahan*, 47 N. Y. Super. Ct. 275. Such a course directly tends to litigation, and the sacrifice of property through nominal sales for a nominal consideration only. In the present case nineteen thirty-seconds of a vessel, worth several thousand dollars, appears to have been thus sold for \$150. If this court had full discretion to entertain a suit of this character, it would not be inclined to exercise it under such circumstances, but would remit the parties to their legal or equitable rights in other tribunals.

In the case of *The Amelia*, 6 Ben. 475, the libellant presented, as in this case, a bill of sale from one who it was asserted had the equi-

table right. This court regarded the suit as one merely to enforce the vendor's equitable claim, and refused to entertain it. Upon appeal to the circuit the decision was affirmed. The opinion of JOHNSON, J., unpublished, is subjoined hereto.¹

The libel must be dismissed, but without costs.

¹THE AMELIA.

(Circuit Court, S. D. New York. July 19, 1877.)

POSSESSION—LEGAL AND EQUITABLE TITLES.

T. built the yacht A. for D., and thereafter accepted part of the purchase money, and was present when D. sold her to one H. by bill of sale, and performed other acts which indicated that he considered himself no longer the owner of the yacht; but the title had never passed from him by any instrument of transfer, or by absolute delivery, and he subsequently claimed the ownership. On suit brought by H. to recover possession, *held*, that the legal title had never passed from T., and, as against a legal title, an admiralty court will not undertake to enforce an equitable title.

In Admiralty.

JOHNSON, J. The facts found in this case appear in the findings placed on file, and, so far as the material question is concerned, do not differ in substance from those which appeared in the district court. The legal title to the vessel did not pass from Towns, the builder, to Doncomb by any instrument of transfer, nor was there any absolute delivery of the yacht. It was part of the agreement that a bill of sale should be executed when the agreement on the part of Doncomb was fully performed, and this time never arrived. The case, therefore, is substantially, as it is stated in the opinion of the district court, an attempt to enforce an equitable interest as against a legal title. This the court of admiralty does not undertake. When it proceeds in a petitory suit, it proceeds upon legal title. *Kellum v. Emerson*, 2 Curt. 79; *The S. C. Ives*, Newb. 205; *The John Jay*, 3 Blatchf. 67, 69; 2 Pars. Shipp. & Adm. 237, note 2. I do not find, and have not been referred to, any case which has been decided in this circuit, or in the supreme court of the United States, which holds a different doctrine; and I should be very unwilling to undertake to introduce a new and, at the least, a doubtful rule, in a case where my decision could not be reviewed, and would be a controlling precedent. If such a rule existed there could not fail to be numerous cases in which it must have been acted on. In *Ward v. Peck*, 18 How. 267, the claimant's case depended on matters clearly within the admiralty jurisdiction,—the power of a master to sell the ship,—and the libellant's had the legal title unless it had been divested by the master's sale; and their legal title was sustained. There are other cases of this class, but they are not thought to conflict with the views expressed in this case by the district court, and which I have adopted.

The decree must be affirmed, with costs.

THE CHARLES ALLEN.

(District Court, S. D. New York. March 10, 1885.)

1. TOWAGE—EVIDENCE—TOWAGE RECEIPT—CASTING OFF IN GALE.

The steam-tug C. A. took in tow the bark E., bound to sea from the lee of Staten island, to tow her down the bay of New York. The wind was high at the time, and the pilot of the tug, before starting, told the pilot of the bark that if the wind increased the tug would be obliged to cast off before reaching buoy No. 8, at the upper end of the Swash channel, and that the bark's pilot should be on the lookout for that contingency, to which the latter assented. The wind did increase until the tug was in imminent danger of swamping; whereupon she gave several short whistles, to indicate that she was about to leave the bark, and then cast off the hawser. The bark attempted to make sail and get to sea, but grounded on the Romer shoal. This suit was brought against the tug for not having taken the bark "to sea," as it was alleged she agreed to do, and for negligence in abandoning her in an improper and dangerous place. A towage receipt, reciting that the bark was to be taken "to sea for \$20," signed by one G., who procured the towage for the bark, and delivered to the master of the bark, was put in evidence. The \$20 was not paid. *Held*, that no authority was shown on the part of G. to bind the bark, and, moreover, that the receipt was superseded by the subsequent conversation between the pilots.

2. SAME—NEGLIGENCE—PERIL OF THE SEA—ERROR OF JUDGMENT.

Two courses were open to the bark in the place where she was cast off: to anchor, or to attempt to get to sea. She chose the latter, and events proved that it was an error of judgment on the part of her pilot. *Held*, that the tug was liable only on proof of negligence; that is, the want of such reasonable care and skill as the circumstances demanded. No negligence could be attributed to her for starting at the time she did. She continued to tow the bark up to the very last moment that her own safety would permit, and she cast off under an undoubted compulsion from perils of the seas, and in a position where the bark had a fair option to continue under sail or to anchor; and the libel was therefore dismissed.

In Admiralty.

Butler, Stillman & Hubbard and *W. Mynderse*, for libellant.

Benedict, Taft & Benedict, for claimants.

BROWN, J. At about 9 o'clock or a little after, on January 17, 1885, the Swedish bark *Elida*, lying off Staten island ready for sea, was taken in tow by the steam-tug *Charles Allen*, to be towed down the bay. The bark had on board a Sandy Hook pilot, between whom and the pilot of the *Charles Allen* there was a brief conversation in regard to the distance that the tug was expected to go. The pilot of the tug testified that he said to him that if the wind should increase much he would be obliged to cast off before reaching buoy No. 8, which is on the east side of the Swash channel, and that he was to be upon the lookout; and that the pilot of the bark assented. Two or three of the tug's hands confirm this account. The pilot of the bark testified that the pilot of the tug said that he would leave him at buoy No. 8. There was a gale blowing at the time from the south-west, but its severity was not felt in the lee of Staten island, where the vessel was then lying. At a quarter past 10, on reaching buoy No. 13, known as the Elbow buoy, below Staten island, the full force of the gale, which was then from the westward, began to be felt. The

tow kept on about half an hour longer, when she was compelled by the fury of the wind and the sea to cast off her hawser and return. She gave two or three signal whistles during about five minutes before casting off, which were heard by the captain of the bark, but were not heard by the pilot, according to his own testimony; and the cast-off hawser was not taken aboard. At that time only the fore-top-mast staysail and maintop-mast staysail and jib had been set, the crew having been delayed in making sail in consequence of the anchor's fouling with the chain when raised. The bark afterwards passed clear of buoy No. 8, leaving it a length or two only on her port side; but not having sufficient sail set to be wholly manageable, through the force of the westerly gale and the ebb-tide, which sets to the eastward, she grounded upon the Romer shoals, between buoy No. 8 and the stone beacon, somewhat nearer the latter. This libel was filed against the tug for not having taken the bark as far as buoy No. 8, which it is alleged she agreed to do; and also for negligence in abandoning her at an improper and dangerous place.

1. The receipt put in evidence reciting that the bark was to be taken "to sea," is not proved in a manner sufficient to bind the bark. No authority is shown in Gundersen, who signed it, to represent the bark or her owners. As a memorandum made by a person assuming to procure towage for the bark, it was, moreover, superseded by the conversation subsequent thereto between the pilot of the tug and the pilot of the bark. On this point the weight of evidence is clearly to the effect that the tug would cast off whenever compelled to do so by increasing wind; and that the pilot of the bark was to be on the lookout for this contingency.

2. The main controversy in the case has been as respects the place where the bark was in fact cast off; the witnesses from the latter contending that it was about midway between the middle and upper buoys of the Romer shoals (Nos. 8 and 14) and near to the easterly line of the channel. The respondents insist that she was cast off when a little below the tail of the west bank and near the westerly shore of the channel; that is, when near buoy No. 13.

I am satisfied that the place where the bark was cast off has been put by the libellant's witnesses much too near buoy No. 8 and the easterly side, and that it was not to the southward of the upper middle buoy, (No. 14,) north-east of the center of the channel. It was probably about half a mile to the northward of buoy No. 14. The testimony of several disinterested witnesses confirms this; and the bark's reaching buoy No. 8 and passing to the westward of it, under the little sail she made use of, shows that she undoubtedly reached it by coming from the north-west, or north north-west. Had she come down along the easterly side of the channel so as to round the Elbow to the westward of buoy No. 8, there is no reason why she should not have gone down the Swash channel in the same manner, instead of grounding as she did. Having been cast off, as I find,

somewhat to the northward of buoy No. 14, the bark had two courses open to her: either to anchor, or to make sail in the attempt to proceed to sea. In that position I find nothing in the evidence to indicate that she could not have anchored with safety. The pilot chose the other course, of attempting to proceed to sea. The topmast stay-sails, the jib, the spanker, and fore and main top-sails were all set, or most of them, it would seem, before reaching buoy No. 8, though there is a little difference in the testimony of the brig's witnesses on this point. The spanker, however, was taken in, and the main top-sail was blown away before reaching No. 8. The evidence shows that the gale at this time was very violent, marking at the Equitable building 40 miles an hour; between 11 and 12, 41 miles; between 12 and 1, 44 miles. I cannot satisfactorily make out from the pilot's testimony why, after setting the spanker, the foresail was not set, so as to obtain sufficient canvas to make the bark manageable, unless it was by reason of the violence of the gale, which he found greater than he had recognized when the tug cast off. According to his own testimony, buoy No. 8 was not reached for some 20 minutes after the tug had left; and that time, he says, was sufficient to set sail enough to make the bark manageable and follow down the Swash channel. If this view be correct, the proximate cause of the bark's grounding was an error of judgment; I do not say a blamable error, but an error of judgment, nevertheless, in undertaking to make sail and proceed to sea in a gale of unusual violence, and finding only too late that he was unable to do so in time to avoid the Romer shoals, instead of anchoring at once, as he might safely have done when cast off.

The tug can be held liable only upon proof of negligence; that is, a want of such reasonable skill and care as the circumstances demanded. In the case of *The Margaret*, 94 U. S. 494, 497, the court say:

"She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work, until it was accomplished." *The Niagara*, 20 FED. REP. 152; *The M. J. Cummings*, 18 FED. REP. 178.

On behalf of the libelants it is urged that when the tug arrived off lower quarantine, at the Elbow buoy, (No. 13,) at a quarter past 10, she was in a position to feel the full force of the gale; and that the anemometer shows that it was then blowing nearly as hard as it did afterwards; and that her pilot ought to have anticipated the greater roughness of the sea further down, and that his boat would be unable to live in it, and was therefore chargeable with want of due care and skill in continuing on beyond buoy No. 13. But since I have no doubt that the bark was in fact cast off above buoy No. 14, she would have gained little or nothing from being cast off at some other point further to the northward, between buoys No. 14 and No. 13. She would have had no wider space to leeward and no better anchorage ground; and

with the intention which her pilot had of taking her out to sea, it was to her evident advantage that the tug should take her as far as possible; and it was the duty of the pilot of the tug to do so, so long as he did not thereby deprive the bark of the alternative of anchoring in safety, if that should be judged necessary.

The evidence satisfies me entirely that the tug did continue towing up to the very last moment that safety to herself and to the lives of those on board of her would permit. No negligence can be attributed to the tug in starting at the time she did. The weather bureau shows that from 7 to 9 the wind abated from 37 miles to 30; between 9 to 10, from 30 to 29; while after they had started, between 10 to 11, it increased again from 29 to 40 miles. In the lee of Staten island, at the time of starting, the wind appeared to be even much less than it actually was. The pilot of the tug not being chargeable with negligence in starting out, and as he cast off under the undoubted compulsion of imminent danger from perils of the seas, and at a place that afforded the bark a fair opportunity and a fair option either to anchor or to continue on under sail, as her pilot might deem expedient, I cannot find any negligence established against the tug, and the libel must therefore be dismissed.

PREMUDA v. GOEPEL.¹

(District Court, S. D. New York. March 14, 1885.)

CHARTER—UNSEAWORTHINESS OF VESSEL—INSURANCE COMPANIES—JUDGMENT OF EXPERTS.

The libelants chartered their ship, the P. B., to the respondents to carry oil to Trieste, and in the charter-party the ship was warranted to be seaworthy. The respondents applied to several insurance companies here and in Europe for insurance on the cargo, but after an inspection by the surveyor of one of the principal marine insurance companies, who reported the vessel unseaworthy, the companies generally refused, and the respondents were unable to obtain insurance, whereupon they threw up the charter, and the owner brought suit against the charterers for the breach of contract. The vessel took another charter and performed the voyage in safety. *Held*, that the warranty of seaworthiness is a warranty that the vessel is in such a fit condition for all the ordinary hazards of the contemplated voyage as to be approved seaworthy in the judgment of impartial and experienced men versed in the business; that the test is not whether the vessel may possibly make one or several voyages without foundering, but whether she is so staunch in her character as to approve herself fit for navigation in the eyes of competent men; that in this case, in view of the almost unanimous refusal to insure on the part of the insurance companies, who are so experienced and competent, and of the direct evidence of serious defects in her hull, the respondents were justified in abandoning the charter; and the libel should be dismissed.

In Admiralty.

This libel *in personam* was filed to recover damages for the respond-

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

ents' breach of a charter-party, in refusing to load the ship Podesta Bazzoni, on the alleged ground of unseaworthiness. The vessel belonged to Trieste. She came to this country in ballast, and arrived at Delaware breakwater in June, where she was left by her owner, who came to New York, and through brokers chartered her to the respondents for a voyage from New York to Trieste to carry 8,000 cases of petroleum. At the time of the charter it was stated to the charterers that she was classed as "A 1½" in the American Lloyds; but this being regarded as a low rank for insurance purposes, the charterers preferred that statement of classification to be omitted from the charter-party; and instead the word "seaworthy" was inserted in writing among the warranties of the owner, no class of rating being stated. The charterers had no previous opportunity of inspecting the ship. On applying for insurance of the intended cargo, difficulty was found on account of the unsatisfactory rating of the ship. On her arrival an inspection was made by the surveyor of one of the principal marine insurance companies, who reported about one-third of her deck-beams in her upper and lower decks, between the fore and mizzen masts, materially decayed; defects in a number of the knees; and the water-ways too much open to admit of caulking; and the defects concealed. She was, accordingly, reported by him as unseaworthy, and insurance was refused. Various other applications were made for insurance in this country, and also by telegraph to insurers in London, Rotterdam, Hamburg, and Trieste. None could be obtained, except on one-fourth of the cargo by the Phoenix company here, and one offer abroad to take one-fifth if the other four-fifths could be placed, which the charterers, with all their efforts, were not able to do. These negotiations and efforts occupied the time from June 30th, when the vessel had arrived in New York and reported her readiness to receive the cargo, to the twentieth of July, when the charterers gave their final refusal to load the vessel. In the mean time repeated requests had been made to the captain to have certain repairs put upon the vessel in dry-dock. The charterers, for that purpose, had offered to advance a portion of the freight. These offers were refused, as well as any repairs, the captain claiming that the vessel was seaworthy, and that any repairs desirable could be made cheaper at Trieste. During this time the market for freight was a rising one. The respondents subsequently shipped the same cargo by another vessel at an increased freight of \$3,200; while the vessel, after this refusal, proceeded to Philadelphia, where she obtained a similar cargo at an increased freight of \$1,600, which in the libel is offered to be offset against claims for demurrage during the delay the ship was put to in this port, and for her expenses in coming and going, until her subsequent charter, amounting, over and above this offset, to \$5,262.90. The cargo mentioned in the charter was of the value of about \$40,000.

Beebe, Wilcox & Hobbs, for libellant.

Jas. K. Hill and Wing & Shoudy, for respondents.

BROWN, J. The charter-party contains a warranty that the vessel shall be "seaworthy, and in all respects tight, staunch, strong, and every way fitted for such a voyage." This is not a warranty that the charterers could get insurance, but it is a warranty that the vessel was insurable; that is, a proper subject for insurance at the ordinary rates for such a cargo and such a voyage. *The Vincennes*, 3 Ware, 171, 178. The fact that certain insurance companies refused insurance is not, indeed, conclusive evidence that the ship was not seaworthy; nor is the fact any more conclusive that the ship was seaworthy, that she made a subsequent voyage without foundering. Seaworthiness is, indeed, a fact to be ascertained and determined like any other question of fact. Questions of seaworthiness arise mostly after a loss has happened. But where a well-grounded suspicion of unfitness arises before loading, under a warranty of seaworthiness, a merchant is not required to put his cargo on board and run the risk of her foundering, before determining whether the ship is seaworthy or not, or whether the warranty in the charter-party is complied with. The question must be determined beforehand upon the judgment of those most competent to decide. Such a warranty, moreover, has reference to the necessities of business, and to the universal if not necessary practice of insuring cargoes. Practically, therefore, the warranty of seaworthiness is a warranty that the vessel is in such a fit condition for all the ordinary hazards of the contemplated voyage as to be approved as seaworthy in the judgment of impartial, competent, and experienced men versed in that business. There is no other possible way in which the charterer can determine such a question, or decide whether he may safely load the vessel, or whether he is bound to load her. Such is the practical test which the charterer has the right to apply, and which the ship must bear, or else the charter may be rightly thrown up.

In this point of view, the almost unanimous refusal of the several insurance companies to insure the cargo upon this vessel, not being limited to rate, becomes very strong presumptive evidence of the unseaworthiness of this vessel in the judgment of those most especially called upon to examine and determine such questions. This was followed up by further proof of a careful examination by a surveyor sent for the purpose to determine whether insurance should be taken or not. There is no reason to infer any bias in this case against the ship. The business of insurers is to insure all vessels fit for insurance. There are the same competitions in this business as in others. The examination disclosed a greater amount of decay in the essential parts of the ship than Lord ELDON, in the case of *Douglas v. Scougall*, 4 Dow, 269, considered undoubted proof of unseaworthiness. On this examination the ship's carpenter accompanied the surveyor, and made the borings testified to; and neither he nor any other witness has been called to qualify the surveyor's testimony as to the defects pointed out.

Much additional testimony was given upon this subject on the question of seaworthiness, all of which I have considered; but in my judgment it does not materially affect what has been said above. The test is not whether the ship may possibly make one or several voyages without foundering, but whether she is so staunch in her character as to approve herself as fit for the navigation contemplated, in the judgment of competent men, according to the customs and usages of the port or country; and this, clearly, this vessel was not in a condition to do. *The Vesta*, 6 FED. REP. 532; *The Titania*, 19 FED. REP. 101, 105-107; *Tidmarsh v. Washington Ins. Co.* 4 Mason, 439, 441; *The Orient*, 16 FED. REP. 916; *French v. Newgass*, 3 C. P. Div. 163.

In this case there is no possible suspicion that the respondents were actuated by any other motives than to avoid great risk of loss through their inability to obtain insurance of the cargo, notwithstanding great exertions to do so. It was greatly to their interest to load the vessel, if she were a fair risk, since freights were rising; and they finally effected a new charter in place of this one at a greatly increased cost. The refusal of insurance had reference solely to the unsatisfactory condition of the ship. To hold a charterer, under such circumstances as appear in this case, bound to load the ship and become his own insurer, would in my judgment defeat, in a great measure, the very purpose of the covenant of seaworthiness, and impose upon the charterer an alternative and a risk never intended by this contract. The case of *The Vesta*, *supra*, is applicable here, and commends itself to my judgment. I do not impugn the good faith of the master in his belief that this vessel could actually cross the Atlantic in safety, as she actually did. Nevertheless, I am quite satisfied that she was not in such a sound and staunch condition as to meet the approval of competent and impartial judges as to seaworthiness, and that the respondents were therefore justified in refusing to load her.

The libel must therefore be dismissed, with costs.

THE TITAN.

THE HILLS.

(Circuit Court, S. D. New York. March 20, 1885.)

1. COLLISION—NEGLIGENCE OF PILOT ACTING AS MASTER—INJURY TO DECK HAND—FELLOW-SERVANTS.

A deck hand who was not on duty, and had no part in the navigation of the vessel, may recover for an injury caused by a collision due to the negligence of a pilot who was at the time in command; following *Chicago, M. & S. P. Ry. Co. v. Ross*, 5 Sup. Ct. Rep. 184.

2. SAME—LOOKOUT.

It is only when a lookout would have been of no service in guarding against a collision that his absence can be excused.

3. SAME—PRESUMPTION AS TO OBSERVANCE OF RULES OF NAVIGATION.

While ordinarily a vessel has a right to assume that another vessel is not derelict in the observance of the rules of navigation, this presumption is not to be carried so far as to exonerate her from ordinary precautions on her own part, or to excuse her from the consequences of a mistake, when, by slight exertion and without any peril to herself or other vessels, she could certainly avoid hazard.

4. SAME—LIGHTS—OBSERVATION.

The rule requiring lights may as well be disregarded altogether as to be only partially complied with, and in a way which fails to be of any real service in indicating to other vessels the position and course of the one carrying them.

In Admiralty.

Owen & Gray and Peter Cantine, for appellants.

Peckham & Tyler, for appellee.

WALLACE, J. Upon the proofs it seems perfectly clear that both the Titan and the Hills were in fault for the collision by reason of which the libellant was injured. The collision took place about 7 o'clock in the evening of September 22, 1882, in the Hudson river, about 1,000 feet out from the Jersey shore, somewhat above the Pavonia ferry slip. The tide was ebb, running about three miles an hour; the wind was light, and the night was gray but fairly clear. The Titan was proceeding up the river bound for Hoboken, against the tide, at a speed of about four miles an hour, on a line with the westerly shore but heading in somewhat towards the shore, towing the float Mohawk, which was heavily loaded with two rows of railway cars, and was lashed to her starboard side. The float as lashed projected some 20 feet beyond the bow of the Titan, and had an umbrella or shed roof which sloped on each side to within about six inches of the top of the cars. This umbrella obscured the green light on the starboard side of the Titan so that it did not show a uniform and unbroken light from right ahead to two points abaft the beam on the starboard side, and there was no green light on the starboard side of the float. The Hills had left the New York side at Twenty-third street bound for Jersey City, light, and proceeded on her course down the river and bearing to the westward at a speed of about 15 knots with the tide. She had no lookout, but her pilot, who was acting at the time as master, and was at the wheel in the pilot-house, saw the Titan when nearly half a mile away. He was able to see the vertical white lights of the Titan and the white light of the float, but he was unable to see the green light of the tug because it was obscured from view by the cars and the umbrella of the float. Not seeing the green light he assumed the tug and float were going down the river, and kept rapidly approaching them at full speed. Soon after seeing the tug and float he observed the ferry-boat Gould, which had left her ferry at Hoboken and was coming by to the westward of the Titan about 150 feet away, and passed across the Titan's bow, but as he supposed across her stern. The Gould gave a signal of two whistles to the Hills and the Hills responded by a like signal. The Titan supposing the signal of the Hills in answer to the Gould was a signal to herself answered the Hills signal with two whistles, but the pilot of the Hills supposed

these were a signal to the Gould. The Hills starboarded somewhat for the Gould and passed her on her port side a couple of hundred feet away, and then her pilot when within 100 feet of the Titan, still assuming that the Titan was going down the river and seeing that a collision with her was imminent, hard ported his wheel to go under her stern. The result was that the Hills came into collision with the bow of the float, and the shock was so severe that the libellant, who was on the Hills, was thrown down and his skull was fractured. The Hills could have avoided the collision with proper effort at the time she came abreast the Gould, being then about 100 yards away from the Titan. She maintained her full speed from the time her pilot first saw the Titan to the time of the collision.

If the pilot in charge of the Hills was warranted in assuming that the Titan was going down the river as he was overtaking and intending to pass her, he assumed the responsibility of passing her safely, and unless he allowed ample distance for the purpose, he was bound to slacken speed, and if need be to reverse in order to avoid collision. In this behalf it was his duty to maintain a diligent observation in order to govern himself as circumstances might require. Instead of doing this, he found his vessel within 100 feet of the Titan, bearing upon her float amid-ships, and sought to save a collision by the maneuver *in extremis* of hard porting his wheel. For a distance of nearly half a mile his view was unobscured, except for the brief interval when the Gould was between him and the Titan. Probably he relied upon his first observation when he concluded the Titan was going down the river, and relying upon this he permitted his attention to be distracted by watching the Gould. Undoubtedly the appearance of the Titan and her float with their vertical white lights apparently in a cluster, while the vessels were approaching each other, with no background by which to determine readily in which direction the lights were moving, and no green or red light to indicate that she was approaching, was well calculated to mislead the pilot of the Hills. But it seems impossible to believe that the real situation would not have been discovered if proper diligence had been exercised. The Hills should be held in fault for not having a lookout.

It is only when a lookout would have been of no service in guarding against a collision that his absence can be excused. The situation here was peculiarly one in which the observation and judgment of a lookout might have been useful. It was one of those doubtful situations in which different points of observation might suggest different conclusions and in which two men might form a different opinion from the same stand-point. There was enough in the rapidity with which the vessels were approaching each other to attract attention and suggest the probability that they were not going in the same direction. The Hills was also in fault for pursuing such a high rate of speed at night, and with the tide, upon waters customarily traversed by numerous vessels, when she was rapidly nearing a tow.

The situation required a high degree of vigilance and circumspection, yet she disregarded every rule of prudent navigation in reliance upon an hypothesis which might be erroneous, and proved to be so. While ordinarily a vessel has a right to assume that another vessel is not derelict in the observance of the rules of navigation, this presumption is not to be carried so far as to exonerate her from ordinary precautions on her own part, or to excuse her from the consequences of a mistake, when by a slight exertion and without any peril to herself or to other vessels she could certainly avoid hazard. There was ample room, plenty of time, and no intervening obstacles in the way of perfect safety if the Hills had slackened speed while she was passing the Gould. After this, it was obvious that the danger of collision with the Titan was imminent, and she should have been stopped and reversed. Instead of doing this, the pilot took the chances of a maneuver which could only be justified by the certainty that he was correct in supposing the Titan was going away from him.

The Titan was in fault for so locating her starboard light that it was not visible, as required by the rules. No doubt is entertained that it was obscured by the umbrella of the float and by the cars on the float forward of the place on the tug where it was located, so that it was not visible to the pilot of the Hills. The rule requiring lights may as well be disregarded altogether as to be only partially complied with, and in a way which fails to be of any real service in indicating to another vessel the position and course of the one carrying them.

The libelant was a deck hand upon the Hills, but was not at the time on duty, and had no part in her navigation. The pilot was in command. Within the case of *Chicago, M. & St. P. Ry. Co. v. Ross*, 5 Sup. Ct. Rep. 184, decided recently by the supreme court, he was not a fellow-servant of the libelant; and the latter is entitled to recover for the injuries he sustained by the collision against the Hills as well as the Titan. Treating the pilot as the master, he was responsible for the management and navigation of his vessel. He was negligent in failing to have a lookout stationed where he ought to have been, and negligent otherwise. The collision was solely the result of his negligence, and the libelant had no part or lot in it.

The decree of the district court is affirmed, with interest and costs of the appeal.

KELLY v. HOUGHTON.

(Circuit Court, D. California. April 20, 1883.)

1. REMOVAL OF CAUSE—ALLEGATION OF CITIZENSHIP.

As a party may be a resident of a state without being a citizen thereof, a simple averment that a party seeking to remove a cause is a resident of a certain state is not sufficient.

2. SAME—REV. ST. § 639, CL. 2.

Rev. St. § 639, cl. 2, has been repealed by the act of March 3, 1875; following *Hyde v. Ruble*, 104 U. S. 407.

On Motion to Remand.

SAWYER, J. This case will have to go back to the state court, on the ground, if on no other, that it is not alleged in the petition or in the pleadings of what state the plaintiff is a citizen. It is alleged that Wetherbee is a citizen and resident of Boston, Massachusetts, but it does not allege of what state the plaintiff is a citizen. It is averred that he is a resident, but does not state that he is a citizen, of California. He may be a resident and not a citizen of California. It is defective in that particular. The petition to remove the case is expressly based on clause 2, § 639, of the Revised Statutes, and the supreme court held last winter, in the case of *Hyde v. Ruble*, 104 U. S. 407, that that section is repealed by the act of 1875. Thus the petition to remove is not based upon an act in force at the time. The application to remove, in express terms, is limited to section 639, which the supreme court hold is repealed.

On these two grounds the case must be remanded. I am not certain that it ought not be remanded also on the other ground that the motion to remove was not made in time; but an opinion on that point I shall reserve till some other occasion. I am inclined to think, however, where the rules of the court provide that a calendar shall be made up, and cases go upon the calendar for trial at the beginning of each month, that each month ought to be regarded as the beginning of a new term. There are no technical terms of the courts under the present constitution and laws of California. Where the rules provide that a trial calendar shall be made up at the beginning of each month, I am inclined to think that the several months, when new calendars are made out and taken up, should be regarded as terms within the meaning of the act of congress. Now this case passed over a good many of such monthly terms after suit was brought, before the application to remove was made. It is true that the law does not contemplate that there shall not be reasonable time for preparing the pleadings and forming the issues, settling preliminary questions of law, and so forth; but it does intend that there shall be reasonable expedition, and that attorneys shall bring on a trial as soon as can reasonably be done in the regular course of proceedings in court, and not delay. If they so delay beyond the time when it

could be brought to issue, and tried in the regular course of proceedings in the court, it is their fault, and not the fault of the law or of the court. This case went over from month to month, for many months, while the preliminary proceedings—demurrers and amended proceedings—were pending and dragging slowly along, and I am not certain that the case ought not to be remanded on that ground.

The case is remanded, with costs.

PERKINS v. HENDRYX and others.

(Circuit Court, D. Massachusetts. April 9, 1885.)

1. EQUITY PRACTICE—BILL FOR DISCOVERY AND GENERAL RELIEF—ADEQUATE REMEDY AT LAW—REMOVED CASE.

Complainant filed a bill in the state court, alleging that defendant had been granted a license to make and sell bird-cages, patented by him, and praying that defendant be compelled to disclose the amount of license fees due, and the number of cages made and sold since a date named, and that complainant be granted such other and further relief as his case might require. The case was removed to the circuit court, where defendant demurred to the bill. *Held*, (1) that, so far as the bill was one for general relief, the court had no jurisdiction, as there existed an adequate and complete remedy at law; and (2) that, so far as it was a bill of discovery, it was open to the objection that it contained no allegation that a suit at law had been brought, or was about to be brought, in which the discovery was material.

2. REMOVAL OF CAUSE—PRACTICE ON REMOVAL—CASE AT LAW OR IN EQUITY—REPLEADER.

Where the suit in the state court unites legal and equitable grounds of relief or of defense, as authorized by the state statute, it may, in the federal court, be recast into two cases, one at law and one in equity, and in such a case a repleader is necessary.

On Demurrer to Bill.

J. McC. Perkins, for plaintiff.

J. L. S. Roberts, for defendants.

COLT, J. This bill in equity was originally brought in the state court and removed to this court. The present hearing was had upon a demurrer to the bill.

The bill alleges, in substance, that the complainant, being the owner of an undivided half interest in a certain patent for hanging bird-cages, granted an exclusive license, during the life of the patent, to the defendants to manufacture and sell the same; that, in consideration thereof, the defendants agreed to pay the complainant one cent for each bird-cage spring made and sold by them under said license; that certain sums of money, as license fees, were paid to the complainant on the first day of each and every month, from October, 1876, down to January 1, 1883, but that the complainant has no means of knowing whether or not the defendants have rendered true accounts of the number of springs sold; that the complainant has no means of know-

ing the number of springs sold since January 1, 1883, but has reason to believe that a much larger number has been sold since that date than before, and that the full sum of \$2,000 is due complainant. The bill prays a disclosure of all license fees due complainant since January 1, 1883, and of all bird-cage springs made and sold by defendants from October 4, 1878, to January 1, 1883, and for such other and further relief as the case may require.

The main object of the bill is for discovery; but, having added a prayer for general relief, it becomes a bill for relief as well. Story, Eq. Pl. § 313. So far as the bill is one for relief, it is clear that this court has no jurisdiction to grant it. The action is brought to enforce a contract, and there exists a plain, adequate, and complete remedy at law. So far as the bill seeks a discovery, it is open to the objection that there is no allegation that a suit at law has been brought, or is about to be brought. In order to support a bill of discovery it must appear that the discovery is asked for the purpose of some suit brought, or intended to be brought, otherwise it will not be entertained, as courts of equity grant discovery to aid some legal proceeding. Story, Eq. Pl. § 321. If a bill in equity seeks relief which the court has no power to grant, and also seeks a discovery, the defendant may demur to the whole bill, if it does not aver that a suit at law is pending, or is about to be brought, in which a discovery may be material. *Mitchell v. Green*, 10 Metc. 101.

But the complainant contends that this case having been removed from the state court, and that court having authority to grant relief in the form here asked for, this court, under the statutes relating to the removal of causes, can proceed and give the same relief. It is sufficient here to observe that in the United States courts the distinction between legal and equitable causes of action is still maintained, and that this applies to causes removed from the state courts, as well as to causes originally brought here. Where the case made by the pleadings in the state court is, in its nature, a law action, it must, when removed to the federal court, proceed as such. Where the suit in the state court is, in its nature, a suit in equity, it must proceed as an equity cause on its removal into the federal court. Where the suit in the state court unites legal and equitable grounds of relief or of defense, as authorized by the statutes of the state, it may, in the federal court, be recast into two cases, one at law and one in equity, and, in such a case, a repleader is necessary. Dill. Rem. Causes, §§ 43, 44, 45.

The demurrer is sustained, but without prejudice to the complainant to amend or replead in this court.

HAMILTON, Trustee, v. WALSH and others.*(Circuit Court, D. Rhode Island. April 16, 1885.)***INJUNCTION TO STAY PROCEEDINGS IN STATE COURT—REV. ST. § 720.**

While an action of replevin, instituted by H., was pending in the state court, he filed a bill in equity in the United States court to reform the chattel mortgage under which he claimed the property. Judgment was rendered against him in the state court, and suit brought on the replevin bond, whereupon he filed a supplemental bill in the United States court, praying an injunction. On motion for a preliminary injunction to stay proceedings in the suit on the bond until final decree on the bill, *held*, the injunction could not be granted.

On Motion for Preliminary Injunction.*Wilson & Jenckes*, for complainant.*Wm. H. Baker*, for respondent.

CARPENTER, J. The complainant commenced an action of replevin in the state court of Rhode Island, wherein he based his title to the property replevied on a certain chattel mortgage. The respondent denied that the mortgage had the effect to convey the property in dispute, and the decision of the suit depended on the interpretation which should be given to the terms of the mortgage. While that suit was pending, the complainant filed his bill in this court, in which he prays a reformation of the terms of the mortgage. The suit in the state court then proceeded to final judgment for the defendant, and he thereupon commenced suit on the replevin bond in the state court. The complainant now files his supplementary bill in this court, in which he alleges the commencement and prosecution of the suit on the replevin bond, and prays an injunction; and he now moves for a preliminary injunction to restrain the respondent from prosecuting the suit on the bond until final decree on the bill for reforming the mortgage.

The statute, in terms, prohibits the granting of an injunction to stay proceedings in a state court, except when authorized in bankruptcy proceedings. Rev. St. § 720. This statute has been held, however, to apply only to cases where the proceedings are first commenced in the state court. *Fisk v. Union Pac. R. Co.* 10 Blatchf. 518; *French v. Hay*, 22 Wall. 250; *Dietzsch v. Huidekoper*, 103 U. S. 494. The complainant points out that the suit on the bond has been commenced since his original bill was filed in this court; and he claims that, upon the rendering of final judgment on the replevin writ, the state court ceased to have jurisdiction of the subject-matter, and that the proceeding in that court was at an end. I cannot agree with this view of the case. The action on the bond is for the purpose of enforcing, or perhaps more properly of securing, the fruits of the judgment in the replevin suit, and is the appropriate process for that purpose. It takes the place of the levy of a writ of execution in an action on the case; and it must for this purpose be taken to be part of the original proceeding in the state court.

The motion is denied.

MEANS, Assignee, v. MONTGOMERY and others.

(Circuit Court, W. D. North Carolina. December Term, 1884.)

1. FRAUDULENT CONVEYANCES—PREFERRING CERTAIN CREDITORS IN ASSIGNMENT.

At the common law an insolvent debtor has the right to make an assignment in trust for the benefit of his creditors, and he may give a preference to *bona fide* creditors to whom he feels under special and honest obligations for previous favors conferred, or for any other honest and meritorious consideration.

2. SAME—RULE IN NORTH CAROLINA—EVIDENCE—QUESTION FOR JURY.

The courts in North Carolina have always been very cautious in finding fraud in a written instrument *as a matter of law*, and where presumptions of fraud arise upon the face of the deed they have uniformly held that the parties are entitled to introduce evidence to explain suspicious transactions and rebut presumptions of fraud; and in cases at law such questions must be determined by the jury.

3. SAME—DEED OF TRUST FRAUDULENT AS MATTER OF LAW, WHEN.

To render a deed of trust fraudulent as matter of law, there must appear upon its face some plain and express provision for the personal benefit of the grantor, or some stipulation which is wholly irreconcilable with an honest and legal purpose of paying, within a reasonable time, the debts of the grantor.

4. SAME—RETENTION OF POSSESSION WITH POWER OF DISPOSITION RENDERS DEED VOID, WHEN.

If there is a provision in a duly-registered deed of trust that the property conveyed shall remain in the possession of the grantor, and that *he shall have the control and disposition of the same*, the questions whether the deed is fraudulent on its face, or is presumptively fraudulent, depend upon the purposes and facts that clearly appear from a fair construction of the express terms of the deed. If provisions are made in the deed for the continuance of the possession of the property in the grantor for an unreasonable time, or for the express benefit of the maker or his family, or for any other purpose which is manifestly wrong or inconsistent with the honest exercise of his legal right of making preferences among his creditors, then the deed is fraudulent in law on its face. Where the dishonest purposes of the grantor are not expressly declared in the deed, or cannot be clearly inferred from the terms and acts set forth, but the terms and acts afford reasonable ground to suspect an evil and unlawful intent, then the parties interested in sustaining the deed must rebut the presumptions of fraud which arise from a fair construction of the instrument. If the provisions of the deed manifest a real purpose of making satisfaction to *bona fide* creditors, in the order mentioned, in a reasonable time, in a convenient manner, with no unlawful intent towards other creditors, and without any substantial benefit to the grantor, then no presumption of fraud can arise on the face of the deed.

5. SAME—CHARACTER OF BUSINESS.

There is nothing suspicious or inconsistent with honesty and fair dealing, or prejudicial to the legal rights of creditors, in a provision in a deed of trust allowing the grantor of a stock of miscellaneous merchandise, which is not consumable in the use, to remain in possession and continue to sell the goods for cash, and deposit the proceeds under the supervision and control of the trustee, with a view to wind up the business in a convenient time, to the best advantage of the creditors.

6. SAME—SURPLUS TO BE PAID GRANTORS.

A provision in a deed directing the surplus, after payment of debts, to be paid over to the grantor, is not fraudulent, and does not give rise to a legal presumption of fraud, as such rights would arise to the grantor by implication of law.

7. SAME—PREFERENCE.

An insolvent debtor, or one so greatly embarrassed that an immediate sale under execution would necessarily result in injury to many of his creditors, who executes a deed of trust for the benefit of all of his creditors, or to give a preference to his sureties, to prevent one creditor by legal process from obtaining full satisfaction of his debt, to the injury of other creditors, commits no fraud.

8. SAME—SCHEDULE OF DEBTS AND CREDITORS.

Under the statute in North Carolina, or at common law, it is not necessary for a grantor in a deed of trust to set forth a schedule of the property conveyed, where there is a sufficient general description of such property, or to attach to such deed a schedule of debts and creditors.

9. SAME—RELATIONSHIP OF PARTIES.

A person who assails a conveyance on the ground of the relationship of the parties must show that the debts secured are not *bona fide*, or that there is something feigned or simulated, or that the parties were influenced by some sinister motive.

10. SAME—FRAUDULENT INTENT.

The burden of proof is upon a party attacking such a deed to establish a fraudulent intent.

11. SAME—CONCURRENCE AS TO INTENT.

To render a deed founded on a valuable consideration void for fraud, both parties must concur in a fraudulent intent, or the grantee must have notice of such intent, or must in some way be privy to the wrongful design.

12. SAME—DEED SUSTAINED.

Upon examination of the evidence and circumstances of this case, and upon a construction of the deed in controversy, *held* that the deed should be sustained.

In Equity.

Jones & Johnston and *A. Burwell*, for plaintiff.

Bynum & Grier and *Platt D. Walker*, for defendants.

DICK, J. The questions of law involved in this case have been frequently debated and considered in the state and national courts, and there has been much fluctuation of opinion and conflict of decision. This want of uniformity of judicial decisions has been produced to a considerable extent by the peculiar facts and circumstances of the adjudged cases, by diversity of views as to public policy, and the varying innovations made in the doctrines of the common law by statutes of fraud in the several states.

The counsel on both sides have carefully prepared printed briefs and arguments, in which they have cited, arranged, and commented upon the leading authorities on the subject. The decisions cannot be reconciled, and I will not attempt to follow the counsel in the course pursued in their elaborate arguments, or cite in this opinion the authorities relied upon, as they are so fully set forth in printed briefs.

In forming my opinion I have been influenced by what I regard as well-settled principles of justice and sound public policy, and have endeavored to follow the decisions of the supreme court of this state, as far as such decisions are applicable to the facts and circumstances of this case. Upon questions of the character involved in this controversy, I feel bound to follow the decisions of the highest court of this state, and I do so willingly, as I concur in the opinions expressed.

The plaintiff, as assignee in bankruptcy of the defendant bankrupts, *Montgomery & Dowd*, seeks to have a deed declared invalid as fraudulent in law on its face, or as fraudulent in fact, because executed with a fraudulent intent on the part of the bankrupt grantors; and that such fraudulent intent was known and acquiesced in by the defendant grantees, or might have been ascertained by them upon

the reasonable inquiry which they ought to have made under the admitted facts and circumstances of this transaction.

The deed of trust was executed on the twenty-fourth of April, 1876, and was recorded on the eleventh of July, 1876. The petition in bankruptcy was filed against the defendant grantors on the twenty-first of December, 1876. As the deed was executed more than six months before the filing of the petition in bankruptcy, the provisions of the bankrupt act as to matters of fraud in the execution of deeds giving a preference to creditors do not apply, and this case must be determined by applying the doctrines of the common law as settled in this state. The deed in trust purports to convey all the stock of merchandise and firm property of the grantors to the defendants A. B. Davidson and C. Dowd, in trust for all the creditors of the firm, but gives a preference in payment to certain specified *bona fide* creditors. It does not appear that the grantors had any other property that could be reached by process of execution.

At the common law an insolvent debtor has the right to make an assignment in trust for the benefit of his creditors; and he may give a preference to *bona fide* creditors to whom he feels under special and honest obligations for previous favors conferred, or for any other honest and meritorious consideration. Most men feel that they are under strong moral obligations to indemnify and save harmless their sureties against liabilities incurred to enable them to carry on their business; and if such liabilities are *bona fide*, and such indemnity is made without any object of private advantage and with a legal and honest purpose, then there are no elements of fraud in such a transaction. Indemnity to sureties is usually afforded by securing the debts upon which they are liable; and the mere fact that the sureties to *bona fide* obligations are relatives of the principal debtor and grantor should not throw even a suspicion of fraud upon the transaction.

Nearly every deed of trust has the effect of delaying creditors in the enforcement of their claims by the ordinary process of the law, but such hindrance and delay is regarded by the law as incidental and unavoidable, and not as fraudulent, within the meaning of the statutes against fraudulent conveyances. By reference to many decisions it will be found that the supreme court of this state has always been very cautious in finding fraud in a written instrument *as a matter of law*; and in all cases where presumptions of fraud arise upon *the face of the deed*, the court has uniformly held that parties are entitled to introduce evidence to explain suspicious transactions, and rebut even strong legal presumptions of fraud, and in cases at law such questions must be determined by a jury. To render a deed of trust fraudulent as matter of law there must appear upon its face some plain and express provision for the personal benefit of the grantor, or some stipulation which is wholly irreconcilable with an honest and legal purpose of paying, within a reasonable time,

the debts of the grantor. Under the registry laws of this state deeds of trust and mortgages are required to be registered in the proper county before they are valid as against creditors and purchasers. The object of registry laws is to enable debtors to make an honest and beneficial use of their property in securing creditors and indorsers in the course of business; to prevent secret incumbrances and transfers of property; and to repel presumptions of fraud which might arise by the grantor's remaining in possession and dealing with property as apparent owner. Full notice is thus given of incumbrances and the purposes for which such deeds were executed, and no false credit can be gained by apparent ownership.

A deed of trust for the benefit of creditors is in the nature of a mortgage, and both are placed together in the provisions of our registry laws, and in many respects the same principles of law are applicable to both kinds of such conveyances. A regular mortgage of personal property is a transfer of the legal title upon condition as a security for the payment of a debt, or the performance of some other obligation; and if the condition is not complied with, the title of the mortgagee becomes absolute at law, and he has the right to take immediate possession.

A deed of trust is an assignment of property to a trustee for the purposes therein declared. It is usually made by a debtor who is in failing circumstances, with a view of securing all of his creditors equally, or giving some creditors a preference over others, and it is seldom practicable or prudent to make provision for the immediate sale of the property conveyed. In both kinds of conveyance the payment of the debts secured is usually deferred to some future day, and the mortgagor or trustor nearly always remains in possession until the mortgagee is entitled to have his money, or the trustee is bound by the terms of the deed to take possession of the property and make sale for the purposes of administering the trusts declared. This retaining of possession by the grantor is not sufficient evidence of fraud, as such conveyances are not valid against creditors and purchasers until they are registered, and registration gives publicity and notice of the transaction. Registration is generally held by the courts to be equivalent to the delivery of possession to the mortgagee or trustee.

In the absolute sale of a personal chattel, if the vendor retains the possession, the transaction is generally regarded as fraudulent as to persons who have been misled to their prejudice by such apparent ownership. But the difference is a marked one between a conveyance which purports to be absolute and a conveyance which, from its nature and design, or by its express terms, leaves the possession in the grantor under certain declared restrictions and incumbrances.

If there is a provision in a duly-registered deed of trust that the property conveyed shall remain in the possession of the grantor, and that *he shall have the control and disposition of the same*, the questions whether the deed is fraudulent on its face, or is presumptively

fraudulent, depend upon the purposes and facts that clearly appear from a fair construction of the express terms of the deed. If provisions are made in the deed for the continuance of the possession of the property in the grantor for an unreasonable time, or for the express benefit of the maker or his family, or for any other purpose which is manifestly wrong or inconsistent with the honest exercise of his legal right of making preferences among his creditors, then the deed is fraudulent in law on its face. Where the dishonest purposes of the grantor are not expressly declared in the deed, or cannot be clearly inferred from the terms and acts set forth, but the terms and acts afford reasonable ground to suspect an evil and unlawful intent, then the parties interested in sustaining the deed must rebut the presumptions of fraud which arise from a fair construction of the instrument.

If the provisions of the deed manifest a real purpose of making satisfaction to *bona fide* creditors, in the order mentioned, in a reasonable time, in a convenient manner, with no unlawful intent towards other creditors, and without any substantial benefit to the grantor, then no presumption of fraud can arise on the face of the deed.

We will now proceed to apply these principles of law in construing the deed set forth in the plaintiff's bill. Among others, there are the following provisions:

"The said parties of the first part are to remain in possession of the said property and choses in action, and continue to sell the goods for cash only, and to collect under the direction and control of the parties of the second part; the proceeds to be deposited weekly in the Commercial National Bank of Charlotte, N. C., and applied, under the direction of the parties of the second part, to replenish the stock by such small bills as may be agreed upon, and to the payment of the debts of said firm as follows."

There is nothing suspicious or inconsistent with honesty and fair dealing, or prejudicial to the legal rights of creditors, in a provision in a deed of trust allowing the grantor of a stock of miscellaneous merchandise, which is not consumable in the use, to remain in possession, and continue to sell the goods for cash in the usual course of trade, and deposit the proceeds under the supervision and control of the trustee, with a view to wind up the business in a convenient time to the best advantage of the creditors. He is familiar with the business, understands the run of trade, and knows the best methods of dealing with his regular customers. Common experience has shown that the best means of disposing of an old and broken stock of merchandise is to replenish the stock to a small extent with new articles in frequent demand and staple commodities which are calculated to induce new trade and the continuance of former custom. I cannot see how the provisions which we are considering could result in injury to the creditors of the firm, as the best method known to common experience was provided for rapidly disposing of the trust property to the advantage of creditors, and the proceeds of sale are se-

cured by being deposited weekly in bank, to be applied under the direction of the trustees to the payment of debts. The trustees, by accepting the trusts declared in the deed, assumed the duty and liability of having them faithfully executed.

By the arrangements made the grantors became the agents of the trustees, and as such agents they were legally entitled to fair compensation for services rendered in winding up the business for the benefit of creditors, although there was no stipulation for that purpose in the deed. If the compensation allowed by the trustees was excessive, then a proper deduction can be made when an account is taken for the purpose of adjusting and administering the trusts. This subsequent matter of fact can in no way affect the validity of the deed as matter of law, or give rise to any legal presumption of fraud; but it may be considered as a circumstance tending to show a concurrence of fraudulent intent in the execution of the deed. The same rule applies to other transactions between the grantors and trustees subsequent to the execution of the deed. If such transactions have caused prejudice to the rights of creditors, the trustees may have incurred liabilities for which they may be held responsible to account upon their adjustment and settlement of the trust fund, and may afford some evidence of a secret and collusive agreement with the grantors at the time of the execution of the deed.

There is a provision in the deed about which I have had some difficulty in forming a satisfactory opinion. The grantors had a clear right to provide for the payment of the notes in the bank, or the renewals of the same, upon which the trustees were indorsers, and if they agreed to pay 12 per cent. interest upon such loans, in common fairness and honesty the agreed interest ought to be paid. I am not so well assured of their right to stipulate for the payment "of any other notes that may hereafter be given by said firm, and indorsed by said parties of the second part, or either of them." This provision seems to contemplate the continuance of the firm business for the benefit of the grantors. This provision is not fraudulent as matter of law, but gives rise to a presumption of fraud which, after careful consideration, I think, is rebutted by the facts and circumstances developed in the evidence in the cause.

The grantors believed that they were solvent at the time of the execution of the deed, provided they could sell their firm property at a fair value and realize a reasonable amount from the collection of accounts and notes due them. The depreciation of property, the dullness of the market, and the failure in collection of the debts due them disappointed their reasonable expectations, and they found in a short time that they were insolvent. I am satisfied that by the stipulation for future advances their purpose was to render their assets more available to satisfy the trusts declared, and that they did not contemplate any personal benefit until all their debts were paid. I am confirmed in this opinion by the fact that the grantors did not make any

new debts, but proceeded to reduce expenses and to sell their stock as rapidly as possible, with a view of winding up the business and paying their debts. The provision in the deed directing the surplus, after the payment of debts, to be paid over to the grantors is not fraudulent, and does not give rise to a legal presumption of fraud, as such rights would arise to the grantors by implication of law.

The last provisions in the deed, authorizing the trustees upon certain contingencies to take actual and personal possession of the goods, and make sales, etc., are not fraudulent, as they are not inconsistent with good faith towards the creditors, and are not so unreasonable or unusual in their character as to give rise to suspicion of wrong. Upon a careful consideration of the express terms of the deed, and the facts and circumstances which they set forth, I am of the opinion that upon a fair construction of the whole instrument it is not fraudulent in law. I am also of opinion that the legal presumptions of fraud which arise on the face of the deed have been fully rebutted by the evidence in the cause.

I will now proceed to examine and consider the allegations of the plaintiff, the answers of the defendants, and the evidence presented, for the purpose of determining the question of fact whether the deed was executed with a fraudulent intent on the part of the grantors, which was known and acquiesced in by the trustees. There is a well-settled rule of law that the burden of proving fraud in fact is upon the party who alleges it; and the proof is insufficient unless it creates a clear and full impression that the allegation is true. When legal presumptions of fraud arise on the face of a deed, then the party who claims under the deed must rebut such presumptions by satisfactory evidence, and his mere declaration of a want of fraudulent intent is not sufficient proof.

I will now consider the specification of the badges of fraud set forth in the brief, and forcibly urged in the argument of the counsel for the plaintiff:

(1) "The fact that the execution of the deed was concealed." (4) "Failure to record the deed for more than two months."

The evidence does not show any unusual effort to keep the execution of the deed from public notice. It was executed in the presence of a subscribing witness, who was not requested to keep the transaction a secret. The deed affected no one but the parties, and no one else had any interest in the matter. It deprived no creditor of any right until it was registered. The failure to register only enlarged the time for creditors to pursue the ordinary legal remedies for the collection of their debts. As to them, the deed had no valid existence until it was recorded, and they had no legal right to know of its existence until it affected their interests.

(9) "The deed made when the suit by Calvin Chestnut was pending against the assignors, and only recorded in time to anticipate the judgment in said suit."

A debtor who is unquestionably solvent, and has the means and resources from which enough might be realized to pay all of his debts, commits a fraud if he executes a deed of trust for the purpose of gaining time at the expense of creditors, in order to dispose of property to advantage and prevent a sacrifice by a sale for cash under process of law; but this rule does not apply to an insolvent debtor, or one so greatly embarrassed that an immediate sale under execution would necessarily result in injury to many of his creditors. Under such circumstances, it is an act of duty and not of fraud for a debtor to execute a deed of trust for the benefit of all creditors, to prevent one creditor, by legal process, from obtaining full satisfaction of his debt to the injury of other creditors. *Reed v. McIntyre*, 98 U. S. 511. The same principle will apply to a deed of trust in which the insolvent debtor honestly exercises his right at common law in giving a preference to sureties, or his *bona fide* creditors, whom he regards as worthy of such special favors. The honest exercise of a clear, legal right does not show an illegal intent.

The evidence shows that the defendant grantors were largely insolvent, and that they believed that they would be unable to meet their indebtedness if they were harassed with the costs and inconveniences of numerous suits, and their property was sacrificed by forced sales under legal process. They hoped to save their creditors from loss and themselves from financial ruin. They stipulated for no benefit for themselves until all the debts were paid, and their object seems to have been to make their property bring the best prices possible for the primary advantage of their creditors.

"No schedule of debts or of creditors attached to the deed, and no inventory taken."

Under the provisions of the bankrupt act bankrupts were required to set forth a schedule of all debts and creditors, and an inventory of their property, but I am not aware of any provision or principle of our state statute or common law that requires a grantor in a deed of trust to set forth a schedule of the property conveyed where there is a sufficient general description of such property, or to attach to such deed a schedule of debts and creditors. The debts and names of creditors who are in preferred classes are set forth in this deed, and then there is a general provision for all other creditors; and this is sufficient certainty of description for the purpose of the trusts declared.

It appears from the evidence that an inventory was taken, just before the deed was executed, in April, and another was taken some months afterwards. It seems to me that prudent and cautious trustees would have taken an inventory for their own protection, and as a means of making a ready settlement of the trusts which they had assumed. But I do not regard the failure, under all the circumstances of the transaction, as evidence of fraud in the execution of the deed. The trustees became personally liable for all the property conveyed,

and their failure to make an inventory manifests a high confidence in the honesty of the grantors, for whom they were indorsers for a large amount in the banks, and for whose misapplication of the property they would have suffered injury as indorsers, and have been responsible as negligent trustees.

"The relationship of the defendants."

I have already briefly referred to this matter, but I will further state the general principle of law, that a person who successfully assails a conveyance upon this ground must show that the debts secured are not *bona fide*, or that there is something feigned or simulated, or that the parties were influenced by some sinister motive or design. The trustees in this deed are relatives of the grantors, but they have no direct interest as creditors, and the debts secured upon which they are indorsers are admitted to be *bona fide*, and were incurred for the benefit of the firm. There is no direct evidence, or any inferences which may fairly arise from the alleged discrepancies or contradictory statements of the defendants, that they entered into any collusion in executing the deed for the purpose of defrauding the creditors of the grantors.

"The defendants' belief that the firm was solvent."

The decided preponderance of evidence shows that the defendant trustees were not satisfied as to the solvency of the defendant grantors, and they were desirous of having the debts secured upon which they were indorsers. The answers of the defendant trustees are directly responsive to the charges of the bill, and are evidence for them which will be sufficient for their protection, unless contradicted by full and satisfactory evidence on the part of the plaintiff, who alleges fraud. Fraud in fact cannot be presumed or inferred without proofs, and the party who makes the charge must prove it by direct evidence, or by circumstances which strongly indicate fraud. The trustees in their answers deny all knowledge or notice of any fraudulent purpose of the grantors, and of all facts from which they could reasonably infer such purpose. Their declarations would not be sufficient to rebut any legal presumption of fraud arising upon the face of the deed, but, upon the question of fact as to a fraudulent intent of the parties in the execution of the deed, the responsive answers are entitled to their full weight as evidence. The burden of proof is upon the plaintiff to establish a fraudulent intent, and the proof he offers is not sufficient to contradict or overcome the responsive answers to the charges of the bill. To render a deed founded on a valuable consideration void for fraud, both parties must concur in a fraudulent intent, or the grantee must have notice of such intent, or must in some way be privy to the wrongful design.

The evidence shows that the grantors represented themselves as solvent at the time of the execution of the deed of trust, and it also shows that they knew that they were greatly embarrassed, their cash sales were small, they could not readily collect the money due them, and were unable to meet their debts at maturity. Their belief of solvency

appears to have been induced by the plausible and eager anticipations—generally entertained by debtors in failing circumstances—that by indulgence and good management in making sales of their goods at fair prices, and collecting the debts due them, they would be able in a short time to relieve themselves from financial embarrassments. The evidence further shows that their property was overestimated in value, and they did not have the means and resources from which enough could be realized to pay all their debts under forced sales by execution, and that their purpose in gaining time to dispose of their goods without ruinous sacrifice was for the primary benefit of creditors, and not for their personal advantage.

Upon a careful review of all the facts and circumstances developed by the evidence, I am of opinion that the plaintiff by his proofs has failed to sustain the allegations of fraud against the defendants, as stated in his bill. I deem it unnecessary to consider the motion of the defendants' counsel to dismiss the bill for the defects and irregularities specified in the brief and argument. Let the bill be dismissed.

BOND, J., concurs.

STACHELBERG and others v. PONCE.

(Circuit Court, D. Maine. February 23, 1885.)

TRADE-MARK—USE BY ASSIGNEE OR PURCHASER—DECEPTION—INFRINGEMENT—INJUNCTION.

An assignee or purchaser of a trade-mark from the original proprietor must in the use thereof indicate that he is assignee or purchaser, or he will not be entitled to protection in the use of the mark so assigned.

In Equity.

Clarence Hale, for complainants.

William Henry Clifford, for defendant.

COLT, J. In this suit the complainants claim the exclusive right to the use of the trade-mark "La Normandi," or "Normandi," which is applied to a brand of cigars, and charge the defendant with infringement in using the words "E. P. Normanda," or "Normanda," or "Normandie," upon a brand of cigars made and sold by him. The complainant Stachelberg obtained, by assignment from one Asher Bijur, of New York, the exclusive right to use this trade-mark, and he subsequently conveyed the right to the firm of Stachelberg & Co., the complainants. It appears that Bijur was the originator of the trade-mark, and had used it for some years, building up quite an extensive sale for this brand of cigars by reason of their good quality. The original trade-mark bore the name of the maker, "A. Bijur," and

also the initials "A. B." Upon the assignment of the trade-mark to Stachelberg, he substituted his own name, "M. Stachelberg," and the initials "M. S." In this form the trade-mark was registered by Stachelberg & Co. in 1876, under the United States law, which has since been declared unconstitutional. *Trade-mark Cases*, 100 U. S. 82. In this case, therefore, the complainants stand on their common-law rights.

The defendant denies the charge of infringement, and rests his defense on various grounds. Whatever may be thought of the remaining defenses, there is one point which we think is well taken, and therefore fatal to any relief prayed for in the bill. In the use of the trade-mark the complainants do not state that it was obtained by assignment or purchase from A. Bijur. Bijur originated the trade-mark, and it thus became a sign of the quality of the article he sold, and an assurance to the public that it was the genuine product of his manufacture. A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied. *Canal Co. v. Clark*, 13 Wall. 311. It imports that the article is made by the original proprietor, and therefore genuine, and the law protects the original proprietor, not only as a matter of justice, but to prevent imposition on the public. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; S. C. 2 Sup. Ct. Rep. 436.

Now, in order that the public may not be deceived, it is essential that an assignee or purchaser of the original proprietor should indicate in the use of the trade-mark that he is assignee or purchaser,—*Sherwood v. Andrews*, 5 Amer. Law Reg. (N. S.) 588,—otherwise the public are misled into purchasing the goods of another manufacturer or vendor as those of the original proprietor. If these complainants have any right of action against the defendant, it is upon the ground that, by copying the trade-mark "La Normandi" in substance, he is misleading the public by false representations into the purchase of his cigars as those made by A. Bijur, the original proprietor of the trade-mark. *Canal Co. v. Clark*, *supra*. And so these complainants, in failing to give notice that they are the purchasers and assignees of the trade-mark from A. Bijur, are practicing the same deception towards the public which they charge against the defendant. The fact that the name "M. Stachelberg" is attached to the trade-mark can no more relieve the complainants of the charge of misrepresentation as to the public than the use of the name "E. Ponce" or "E. P." can relieve the defendant of such a charge. It is the use of the fanciful words "La Normandi," or words of substantial similarity, that is calculated to mislead. The supreme court, in *Manhattan Medicine Co. v. Wood*, *supra*, declare that the object of a trade-mark being to indicate by its meaning and association the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use, otherwise a de-

ception would be practiced upon the public, and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer.

Under the rule laid down in *Manhattan Medicine Co. v. Wood*, the complainants have no standing in a court of equity, and the bill must be dismissed.

HILLS and others v. STOCKWELL & DARRAGH FURNITURE CO.

(Circuit Court, W. D. Michigan, S. D. March 4, 1885.)

1. FRAUD ON CREDITORS—CHATTEL MORTGAGE—PREFERRING CREDITORS.

In Michigan an insolvent debtor has a legal right to secure one or more *bona fide* creditors in preference to others, where no fraud is intended; and the mere fact that a chattle mortgage given for that purpose operates incidentally to hinder and delay other creditors in collecting their debts does not affect the security.

2. SAME—FRAUDULENT INTENT—QUESTION OF FACT.

The Michigan statute declares that the question of fraudulent intent is one of fact and not of law.

3. SAME—RETENTION OF POSSESSION WITH POWER OF SALE.

Provisions in a chattel mortgage that the mortgagor shall continue in possession of the property, and continue sales thereof at wholesale and retail, with an omission of a stipulation to apply the proceeds of sales to pay the secured debts, do not make out constructive fraud or fraud in law.

4. SAME—CONVEYANCE WHEN VOID IN LAW.

When a court says the law declares a conveyance void for fraud, or imputes to it fraud, what is meant is that the law will not sanction a conveyance, against the claims of creditors, when its provisions are illegal or are not reconcilable with an honest purpose, and then declares it void upon its face because no evidence could change its character; as, in case of a deed made by a debtor for his own support or benefit, or for the benefit of those dependent upon him for support, or without consideration, and the like.

5. SAME—ATTACHMENT DISSOLVED.

Chattel mortgage executed by a manufacturing corporation to secure indorsers of its paper, most of whom were its directors, containing a provision that the mortgagor should retain possession of the property and sell it at wholesale and retail, construed, and held not fraudulent as matter of law, and ground for an attachment.

Assumpsit. Order *nisi* for the dissolution of an attachment.

Smiley & Earle, for plaintiffs.

R. W. Butterfield, for defendant.

WITHEY, J. On the twenty-second of December last the plaintiffs sued out a writ of attachment against the property of the defendant, based on an affidavit that the latter had disposed of its property with intent to defraud its creditors, and seized part of the personal property which, in August previous, the defendant had chattel mortgaged to Wilder D. Stevens, in trust to secure five persons, indorsers of its paper, aggregating about \$87,000, and also to secure its employes for labor debts, due and to come due. The mortgage covered the entire stock in trade of the company, including lumber, furniture, and per-

sonal effects, and all additions and accretions. It permitted the company to continue in possession and carry on its business, but restricted sales to such as should be made in the ordinary course of the wholesale and retail business of the company. The company manufactured furniture. The mortgagees' interest in the property was to be kept insured in not less than the amount of the insurance at the date of the instrument, but the company might reduce the insurance in proportion as the value of the property should be reduced from time to time. All but one of the indorsers were stockholders and directors in the company. The secretary and president are indorsers of part of the paper of the company secured by the mortgage, and executed the mortgage under the authority of a vote of both the stockholders and board of directors.

The instrument recites the date and amount of each piece of paper, when due, and the name of the indorser or indorsers; that the company is indebted to the persons in its employ, and desires that they shall continue in its employment, and desires to secure to them the payment of sums due and to come due to them, and also desires that the said indorsers of its paper shall continue to indorse renewals of its paper up to at least the first day of January, 1885, which they are willing to do if secured. The company agrees "to take up and pay all such paper subsequently coming due and not renewed; to pay all renewals and all such paper now past due on or before January 1, 1885, unless the same can be renewed, and in that case to pay the renewal or renewals thereof, and to save harmless the said indorsers on such paper from all loss and damage by reason of such indorsements." In case the company does not pay according to the terms of the instrument, and keep harmless the indorsers, the mortgagee may take possession of and sell the property at private or public sale.

The plaintiffs, by an order *nisi*, were ordered to show cause why the writ of attachment should not be dissolved and the property discharged. It is incumbent on them to make out that the mortgage was executed with intent to hinder, delay, or defraud creditors. The proofs show (in addition to what has already been stated) that at the date of the instrument the defendant corporation was unable to pay its debts as they matured, and had asked the plaintiffs to extend the debt on which this suit is brought. It had received notice from the bank where it transacted its principal banking business, and which held \$30,000 of the company's paper, that ten or more thousand dollars, soon to mature, would not be renewed, and the indorsers on that paper had also been notified of such intention on the part of the bank. The company owed more than \$12,000 of unsecured debts. One of the officers of the company, produced by the plaintiff, testified in substance that there were three immediate reasons for giving the mortgage: (1) The company had got behind with the men in its employ and they were getting uneasy; (2) the only indorser of the compa-

ny's paper not a director, and two of the directors who were indorsers, demanded security if they continued to indorse; (3) defendant's bank had given notice to it and to the indorsers that certain paper would not be renewed; but it was believed, notwithstanding, that the bank would be satisfied if all the paper it held against the company was secured, and that was the purpose in giving the mortgage. "We thought," says the witness, "we could then, aided by the time thus obtained, go on and pay what we owed." We had no idea but what our debts would be paid. Our general indebtedness had, within a short time, been largely changed to the banks by borrowing of them on indorsed paper. We had been accustomed to take our drafts to our bank and have them credited up to us. About this time the bank refused to do this. We had thirty or forty thousand dollars of accounts, half of which were collectible. There is no question made as to the *bona fides* of the indebtedness intended to be secured by the mortgage."

It is insisted by the plaintiffs that the mortgage is fraudulent in fact, and fraudulent upon its face as against the general creditors of the defendant. I am unable from the evidence before me to discover any intention on the part of the officers of the corporation to hinder, delay, or defraud creditors. The indebtedness existed and was *bona fide*; the defendant was unable to pay promptly its debts, due and to fall due, and the indorsers of its paper demanded security before renewing their indorsements. It does not affect the question if the company could never pay its debts in full; for the legal right of an insolvent debtor to secure one or more creditors in preference to others, where no fraud is intended, is settled in Michigan by many decisions. The mere fact that the security operates incidentally to hinder and delay other creditors in collecting their debts does not affect the security. Both facts may and should be considered in determining whether fraud was intended.

The statutes of Michigan relating to chattel mortgages and to conveyances fraudulent against creditors, as construed by the supreme court of the state, constitute rules of property, binding as well upon the national as upon the state courts. This mortgage did not hinder or delay creditors, within the meaning of the statute, unless it was made with a fraudulent intent; and if it was not made with a fraudulent intent, its execution was no ground for an attachment of the defendant's property. The statute declares that the question of fraudulent intent shall be a question of fact, and not of law, and I find there was in fact no fraudulent intent. The mortgage was given to secure indorsers of *bona fide* indebtedness of the company, and of persons to whom *bona fide* debts were owing, and nothing in all that was done indicates a purpose inconsistent with honesty and fair dealing on the part of the officers of the corporation, or any of the beneficiaries under the mortgage. The corporation contemplated continuing in business through the assistance the mortgage would incident-

ally afford, enabling it to obtain renewals of its paper, and giving it time through such credit to convert its stock and work out. It does not matter whether such hope was justified by the circumstances; if such was the purpose, and nothing more, a fraudulent intent can not be predicated of the facts.

But the principal contention by the plaintiffs is that the instrument is constructively or presumptively fraudulent, for two reasons: (1) That it neither fixes nor contemplates a time certain within which the indorsed indebtedness of the corporation is to come due and payable; (2) that the mortgage is executed by the president and secretary of the company, who on the face of the instrument are beneficiaries of its provisions. It is also true that other of the beneficiaries are directors in the corporation. There is no agreement to renew any part of the indorsed paper, but in case any of it should be renewed, then such renewals are to be paid.

The mortgage recites that the company desires to have the indorsers renew paper, and that they were willing to do so if security was given for their indorsements. Legally, therefore, whenever the holder of any of the paper should refuse to renew, or whenever any indorser should refuse, that particular paper would be due and payable. This was part of the arrangement to enable the company to avoid suspension, and to enable it to go on manufacturing and selling its goods. I do not regard such an arrangement constructively fraudulent, but a fact to be considered, like any other fact, tending to show the intention of the parties in making the mortgage. Even if its provisions do, incidentally, hinder or delay creditors, it does not follow that fraud was intended. The provisions that show the mortgagor was to continue in possession of the property, and was to continue sales at wholesale and retail, together with the omission of a stipulation to apply the proceeds of sales to pay the secured debts, do not make out constructive fraud, or fraud in law; and it has been so ruled in this state. They are to be considered as other facts and circumstances on the question of fraudulent intent. The terms of the mortgage as to renewals, leaving it uncertain when the indebtedness was to be paid, are to be scrutinized, but, like the other provisions alluded to, constitute no conclusive evidence of a fraudulent intent.

Again, the fact that the officers who executed the mortgage, and the directors, are among the beneficiaries of its provisions, calls for the closest scrutiny, but, in my opinion, raises no conclusive presumption that there was an intent to hinder, delay, or defraud creditors. The law seldom imputes fraud in reference to a conveyance made under a statute which declares "the question of fraudulent intent, in all cases arising under this, or either of the last two preceding chapters, shall be deemed a question of fact and not of law."

I apprehend, when a court says the law declares a conveyance void for fraud, or imputes to it fraud, what is meant is that the law will not sanction a conveyance, against the claims of creditors, when its

provisions are illegal or are not reconcilable with an honest purpose, and then declares it void upon its face because no evidence could change its character; as, in case of a deed made by a debtor for his own support or benefit, or for the benefit of those dependent upon him for support, or without consideration, and the like. *Oliver v. Eaton*, 7 Mich. 108; *Bagg v. Jerome*, Id. 145. See, also, *Brett v. Carter*, 2 Low. 458; and *Hughes v. Cory*, 20 Iowa, 399.

The case of *Robinson v. Elliott*, 22 Wall. 513, is much relied on by the plaintiff's attorneys, and if that case had arisen in this state, the decision would seem to control this case on the question of the effect of leaving the mortgagor in possession of the property, and render the instrument void for fraud; but the chattel mortgage in that case was made in Indiana, and does not, therefore, control my judgment when passing upon a mortgage in Michigan, governed by its laws as uniformly interpreted by its courts. It was also there determined that a mortgage which by its terms permits or contemplates the indefinite prolonging of the debt secured by the mortgage, is void as against existing creditors. It is argued here that, as the Michigan supreme court has never passed upon that question, this court should follow the doctrine on that subject applied in *Robinson v. Elliott*. That case was decided on its own facts, or on the provisions of the mortgage under discussion therein, and under a statute of Indiana that had not been expounded by the supreme court of the state; but here is a mortgage with different provisions, and, under the decisions of this state, ought not to be decided by the reasons and conclusions expressed by Mr. Justice DAVIS in *Robinson v. Elliott*, upon either question ruled in that case. That was a suit in equity; this is an application to dissolve a writ of attachment by virtue of which the defendant's goods have been seized and are held on the charge that the defendant has disposed of its property with intent to defraud its creditors. Under this application to dissolve the attachment, the court has no power to decide anything more than whether this mortgage was made with a fraudulent intent, and discharge or sustain the seizure that has been made. A court of equity could decree so as to protect, not alone the plaintiffs, but all the creditors, including the directors who are indorsers, by a distribution of the proceeds *pro rata* to all the defendant's creditors. A court of equity will preserve legal rights, but it will not permit them to prevail to the exclusion of equitable rights and considerations. If the plaintiffs had a judgment, and should file a bill in equity to restrain the mortgagee taking possession of, selling, and appropriating the property, because the officers and directors have made themselves beneficiaries under the mortgage, to the exclusion of other creditors, there are cases deciding that in such suit the officers and directors would not be permitted to take undue advantage of their position by securing themselves to the exclusion of other creditors; but, even then, the beneficiaries under the mortgage, not officers or stockholders, might be entitled to the bene-

fit of the mortgage as a security. *Bradley v. Farwell*, 1 Holmes, 433; *Coons v. Tome*, 9 FED. REP. 532; *Gas-light Co. v. Terrell*, L. R. 10 Eq. 168. Among cases that hold somewhat different views are *Stratton v. Allen*, 16 N. J. Eq. 232; *Whitwell v. Warner*, 20 Vt. 444; *Railroad Co. v. Claghorn*, 1 Speers, Eq. (S. C.) 561, 562. See Ang. & A. Corp. § 233; also *Buell v. Buckingham*, 16 Iowa, 284, 291.

But I am not called upon to decide, as in a court of equity, the effect of the mortgage upon the distribution of the defendant's property, and the rights as between the general creditors and the officers of the corporation as to the mortgaged property. The question before me is whether a creditor, who attaches property under a statute giving to him the right, upon making and annexing to the writ an affidavit that the defendant therein has disposed, or is about to dispose of, his property with intent to hinder, delay, or defraud his creditors, and being required to show cause why the attachment should not be dissolved, can maintain the seizure without showing fraud in fact, or, at least, that the necessary result is fraud, shown by the production of the mortgage and which no evidence could change, in view of the statute making the question of fraudulent intent one of fact and not of law.

The ultimate fact turns upon whether the directors, in directing the mortgage to be made to a person in trust to secure outside creditors, and at the same time indemnify themselves against indorsements for the company, under the circumstances and for the objects stated, must be held necessarily to have intended fraud. I cannot see that they did. It is not competent in this proceeding to predicate constructive fraud upon the mere fact that they availed themselves of their superior advantages to obtain indemnity against their indorsements.

I call attention to *La Belle Iron Works v. Hill*, 22 FED. REP. 195, wherein Mr. Justice MILLER, in a trial involving the validity of a writ of attachment under the statute of Missouri providing that the plaintiff in any civil action may have an attachment "where the defendant has fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors," held that a deed of trust given by the defendants "did not hinder and delay creditors, within the meaning of the Missouri statute, unless it was made with a fraudulent intent, and that its execution was no ground for an attachment unless there was fraud in fact, and that fraud in law was not sufficient." He said to the jury: "If you believe that deed of trust to be an honest instrument,—if you believe it was made for an honest purpose, you will find for the defendants; but if you believe it to have been made for a dishonest purpose, you will find for the plaintiff."

The deed of trust was made to secure the payment of debts, but provided that none of the property conveyed should be sold within two years. There was a contemporaneous agreement that the trustee should conduct the business of defendants in the firm name, and

only such creditors as should sign the agreement were to share in proceeds of the sales of the personal property, but all were privileged to sign. One of the defendants testified that the deed was made with the hope that the personal property would suffice for the payment of the firm debts, and they hoped to save the real estate.

The attachment of the property in question is dissolved. The defendant has appeared and plead, which saves the suit in court for recovery at the proper time of the plaintiffs' damages upon their claim.

PRUDENTIAL ASSUR. CO. *v.* ÆTNA LIFE INS. CO.

(*Circuit Court, D. Connecticut.* April 14, 1885.)

LIFE INSURANCE—REINSURANCE—ORAL PROMISSORY REPRESENTATION.

The failure of an insurance company that procures reinsurance to comply with an oral promissory representation in regard to its future conduct, made without fraud or falsehood, before the policy was issued, and not alluded to therein, is not a valid defense against the insurer's liability upon the policy.

At Law.

E. C. Henderson, for plaintiff.

Charles J. Cole, for defendant.

SHIPMAN, J. This is a demurrer to the second defense in the defendant's answer to the plaintiff's complaint upon a policy of life insurance. The facts admitted to be true, for the purposes of pleading, are as follows: In the year 1854, the National Loan Fund Life Assurance Society, which in the year 1839 had issued to Edward Lawson its policy of insurance upon his life for £3,000, applied to the defendant to reinsure \$5,000 of said risk, which was still outstanding. On making said application, the society represented to the defendant, in order to induce it to issue a policy of reinsurance for said sum, that the risk was a good one,—a most excellent risk,—and they were willing rather to keep \$10,000 at risk on the life than buy the policy; and thereupon, upon the faith and credit of the representation that the society would keep \$10,000 at risk on said life rather than buy the policy, the defendant issued to said society a policy of reinsurance on Lawson's life for the term of seven years. In the year 1861, on the expiration of this term, the society, the name of which had been changed to the International Life Assurance Society, desired to renew said policy for the term of life. The defendant required a new medical examination of Lawson, so as to show his physical condition at that time, and, the same being furnished, upon the faith and credit thereof and of the previous representations made at the time of issuing the original reinsurance policy, the policy in suit was issued.

In the year 1866 the society reinsured £500 of its said risk in the Royal Insurance Company of London. In the year 1869 the society ceased business and went into liquidation, and a liquidator thereof was duly appointed. On or about March 30, 1871, the society reinsured the entire risk on Lawson's life. Lawson died in May, 1879, having shortly before his death, and in the same year, surrendered to the plaintiff, for £690, the policy issued to the International Society upon his life. The plaintiff alleges that on March 30, 1871, the official liquidator of the society assigned to the plaintiff, for a valuable consideration, the defendant's policy on Lawson's life, now in suit. This is denied by the defendant. It is agreed that from March 30, 1871, until Lawson's death, the premiums on said policy were regularly paid to the defendant by the plaintiff.

It is not denied that the representations in regard to the character of the risk were true, nor is the willingness of the society, at the time of making the application, to keep \$10,000 at risk denied. An interpretation of the language of the society, in regard to its willingness to keep the specified sum at risk, is that it was then willing or then wished to pursue that course. The defendant interprets the meaning to be that the society represented that it would keep \$10,000 at risk rather than buy the policy. The non-performance of its representations is alleged to consist in the reinsurance of £500 in 1866, and a reinsurance of the whole risk in 1871, after it went into liquidation.

Assuming that the construction which the defendant places upon the language of the original insurer is correct, and that it promised to keep the specified sum at risk, not only through the life of the policy which the defendant issued in 1874, but during the life of all subsequent policies which it might issue on Lawson's life, and that it promised that, upon going into liquidation, no reinsurance should be effected, the question arises, is the failure of the assured to comply with an oral promissory representation in regard to its future conduct, made without fraud or falsehood, before the policy was issued, and not alluded to therein, a valid defense against the insurer's liability upon the policy?

This subject has been considered recently by the supreme court in *Insurance Co. v. Moury*, 96 U. S. 544, and by the supreme court of Massachusetts in *Kimball v. Ætna Ins. Co.* 9 Allen, 540. The extended discussion which was given in these cases to the subject of oral promises made without fraud, prior to the written contract, precludes the necessity of any lengthy argument.

The authorities generally notice the distinction between an untrue representation of a material existing fact, which makes the contract a nullity because the minds of the parties never met and there was no agreement, and an oral promissory representation made, without fraud, before the written contract, in regard to the intention, purpose, or future conduct of the promisor. The latter class of repre-

sentations, unless incorporated in the policy, are of no importance, "because the written instrument is the expression and the only evidence of the duties, obligations, and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence." *Kimball v. Aetna Ins. Co.* 9 Allen, 540. Mr. Justice GRAY, who delivered the opinion in this case, further says:

"But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract."

The insurer is at liberty to compel an observance of promises in regard to future conduct, by incorporating them into the written contract, if it regards a performance as important, but the promise, unless embodied in the contract, is not a part of it. All things to be done by one or the other during the continuance of the written agreement, upon the doing of which the life of the contract depends, must appear in the agreement. *Alston v. Mechanics' Ins. Co.* 4 Hill, 329; *Mayor of N. Y. v. Brooklyn Ins. Co.* *43 N. Y. 467; *Bryant v. Ocean Ins. Co.* 22 Pick. 200; *Insurance Co. v. Mowry*, 96 U. S. 544.

The case of *Traill v. Baring*, 10 Jur. (N. S.) 377, and 3 Bigelow, Ins. Cas. 233, is not inharmonious with the authorities that have been cited. The facts of that case as stated in the syllabus in Bigelow's Cases are as follows:

"Insurance company A., (having previously granted a policy of reinsurance to insurance company B., on the life of L. I., for £3,000,) on the tenth of May, 1861, offered to insurance company C. £1,000 of the risk, stating that insurance company D. had agreed to undertake £1,000, and that they (company A.) would retain £1,000. Company C. accepted the proposal without the usual investigation or inquiries into the age, health, or habits of the insured, as a partnership risk. The policy granted by company C. was dated and the premium was paid on the eighteenth May, 1861. Company D., on the fifteenth May, 1861, came to a resolution not to, and they did not in fact, retain any portion of the risk, but this resolution and the course of action upon it was not communicated to company C. In 1862 the insured died of the heart disease. Held, that the policy granted by company C. was void and must be delivered up to be canceled."

The gist of the case, as shown in the opinion of the vice chancellor and of the judges upon appeal, was that when the contract was perfected the representation which had been made was not true, and that the change of intention which took place before the contract was entered into, should have been communicated to the other contracting party. The circumstances bring the case within the principle that an untrue representation of a material, and then existing, independent or collateral, fact, affecting the risk, vitiates the policy.

I have not thought it necessary to consider whether, upon a fair

construction of the representations made in 1854, the policy in suit, which was issued in 1861, was properly affected by them, or whether there was any breach of the promise.

The demurrer is sustained.

In re TONG AH CHEE.

(District Court, D. California. November 14, 1883.)

CHINESE IMMIGRATION—ACT OF 1882.

A Chinese laborer, who left the United States after the act of May 6, 1882, went into effect, and who deliberately, and with full knowledge of the law, omitted to apply for his certificate, for the reason that he had no expectation or hope of ever returning to the United States, is not entitled to return.

On Habeas Corpus.

S. G. Hilborn, U. S. Atty., for the United States.

Messrs. Van Duzer and Teare, for petitioner.

HOFFMAN, J. The petitioner in this case claims the right to re-enter the United States on the ground that he was a resident of the United States at the date of the treaty, and is therefore protected by its second article. He admits that he is a Chinese laborer; that he left the United States after the law of May 6, 1882, went into effect; and that he voluntarily omitted to procure the certificate in that law mentioned, for the reason that he had no expectation of returning to the United States. The third section of the act of May 6, 1882, is as follows:

"That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of this act, and who shall produce to such master, before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned."

Under this section it has recently been held by this court that the Chinese laborers referred to were those who were in the United States at the periods mentioned, and who might leave the United States after the act went into effect, but that the act could not be construed to require the production of the certificate from those laborers who left the United States before the passage of the law or before it went into effect. It was considered by the court that the second article of the treaty secured to Chinese laborers in the United States at the date of the treaty the right "to go and come of their own free will and accord," and that it could not have been the intention of congress to deprive them of this right by exacting from them as a condition of its exercise the production of a certificate which it was impos-

sible for them to procure. But it was also considered that Chinese laborers leaving the United States *after* the law went into effect, and who might wish to avail themselves of the privilege of returning, secured to them by the second article of the treaty, might properly, and without a violation of the letter or spirit of the treaty, be required to procure the certificate, which the act directs shall be furnished to them without charge, as a means of identification, and as furnishing the test, if not the only method, of preventing evasions of the law.

In the case at bar the petitioner deliberately, with full knowledge of the law, omitted to apply for his certificate, for the reason that he had no expectation or hope of ever returning to the United States. He has thus by his own act of omission renounced the right secured to him by the treaty, by neglecting to procure the evidence of that right which the law requires, and which it was entirely within his power to obtain. I am therefore of opinion that the application of the petitioner should be denied.

In re TREADWELL and others, Bankrupts.

(District Court, D. California. May 16, 1883.)

BANKRUPTCY—COMPENSATION OF ATTORNEY OF ASSIGNEE.

As the attorney of the assignee appears to have saved to the estate \$30,000, after protracted litigation, *held*, that \$5,000 should be allowed as a fair and reasonable compensation for such services as had been rendered and as should be required as incidental to the final closing up of the estate.

In Bankruptcy.

Lloyd Baldwin, in propria persona.

T. Z. Blakeman, for opposing creditors.

HOFFMAN, J. Considering that by the efforts of the attorney for the assignee the sum of \$30,000 was saved to the estate after a protracted litigation in this court, and in the circuit court on appeal.

2. That more than half the creditors have expressly in writing assented to the allowance to the attorney of \$5,500; that creditors to the amount of \$99,175, who have not signed the assent, were present at the creditors' meeting, and offered no objection to the allowance, and do not now object to the same, and the creditors who now except represent only one-eleventh of the total amount of unsecured debts, viz., \$368,854.61.

3. That the attorney for the objecting creditors proposed at the beginning of the litigation to compromise the same by paying \$5,000 in satisfaction of the claim of \$30,000, which offer was declined by the claimants, and that by the final decree of the court the whole claim has been rejected.

4. That the claim, if allowed, would have absorbed the whole as-

sets of the estate then remaining undisturbed in the hands of the assignee; and that the services of the attorney in resisting and finally defeating the claim were rendered with no certain assurance of compensation; and that such compensation was practically contingent on the result of the suit.

5. That the claim of Amos Ranke against the estate for \$27,000 was defeated after argument and reargument on demurrer; and that other claims were presented, in opposing which the services of the attorney in opposition to them were necessary and were rendered.

6. That numerous attendances in court, consultations with the assignee, communications, oral and in writing, with creditors occurred, which must necessarily have occupied a considerable portion of the attorney's time, and for which he is entitled to compensation.

In view of the foregoing, I allow the sum of \$5,000 as being in my judgment a fair and reasonable compensation for the services of the attorney rendered since March, 1881. I have reduced his claim by \$250 on the grounds (1) that the fees claimed for preparing the petition, orders, etc., for a sale of remaining assets of the estate, amounting to \$364, is in my opinion excessive; (2) that I am doubtful whether the assignee can charge against the estate any sum for fees paid to his attorney for drawing a bond which by order of the court he was required to give.

It is understood that the sum hereby allowed includes compensation for services, if any, which may hereafter be rendered by the attorney incidental to the final closing up of the estate.

WATSON v. CINCINNATI, I., ST. L. & C. RY. CO.

(Circuit Court, D. Indiana. March 30, 1885.)

PATENTS FOR INVENTIONS—GRAIN-CAR DOORS—PATENTS NOS. 203,226. 78,188—
INFRINGEMENT.

Patent No. 203,226, granted to Chauncey R. Watson, on April 30, 1878, for an improvement in grain-car doors, construed and compared with patent No. 78,188, issued May 26, 1868, to Martin M. Crooker; and *held*, that defendants were not guilty of infringement.

In Equity.

C. P. Jacobs, for complainant.

Geo. Payson, for defendant.

Woods, J. This action is brought against the defendant company for the infringement of letters patent No. 203,226, granted to complainant for an improvement in grain-car doors, bearing date the thirtieth day of April, 1878. The bill alleges that the complainant's invention consists in the combination in an ordinary freight car of the solid sliding outside door, and an inner flexible door, called a grain-door,

which is adapted to slide up overhead, when not needed for use, on rods or other equivalents; this grain-door being of a height to fill not all, but only about half the door-way opening. The answer of the defendant denies the value and novelty of Watson's invention; denies infringement, and alleges that the grain-car doors used by the defendant, as charged in the bill, were made under and in conformity with letters patent No. 78,188, issued May 26, 1868, to Martin M. Crooker. In further exhibition of the prior art, reference is made to other patents, including No. 118,514, issued August 29, 1871, to Horace L. Clark. General replication.

It is admitted by stipulation between the parties "that before the commencement of this suit the defendant hauled over its line of road, in the state of Indiana, freight cars belonging to the Chicago, Rock Island & Pacific Railway Company, having a solid outside door, like an ordinary freight car, and an inner flexible sliding grain-door, of less height than the opening in the side of the car, the grain-door sliding in grooves, like the grooves shown in the patent of Martin M. Crooker, of May 26, 1868, and the slats composing the door being attached to each other by being strung upon wires passing through the slats."

The complainant's claim, as contained in his letters patent, is of the following tenor:

"The combination with a car of an inside flexible or yielding sliding grain-door, having staples, *c*, and the vertical and horizontal bent guiding-rods, *C*, extending from the floor of the car upwardly and under the roof of the car, as herein shown and described, whereby said door, when not in use, can be carried up on the horizontal portions of said guiding-rods out of the way, substantially as specified."

His specification contains the following statements:

"This invention relates to improvements in the class of grain-doors for cars; and the invention consists in the combination with a car of an inside vertically-sliding flexible or yielding door and guiding-rods, whereby the door, when not in use, may be carried up and placed on the horizontal portion of said guiding-rods, so as to be out of the way, all as substantially hereinafter described. Referring to the accompanying drawings, *A* represents the body of a car, having guiding-rods, *C*, at either side of the door-way, fastened at their lower ends in the floor of the car, which rods extend upwardly and parallel with the inner frame of the car, to within a short distance of its top, where they are curved and suitably braced to the central roof-timber, *B*. *D* represents the grain-door, constructed of longitudinal sectional pieces, d^1 , d^2 , d^3 , hinged together, as shown at *e, e*. The upper and lower sections thereof, d^1 and d^3 , are provided with staples, *c, c*, which encompass the guiding-rods, *C*, and serve to direct the movement of the doors when it is desired to place them out of the way at the top of the car. • The guiding-rods at their lower ends may be provided with screw-threads, which work into metal plates provided with female threads, which latter, when affixed to the floor of the car, serve to hold the rods firmly thereto, and in proper position to admit of the desired movement of the grain-doors. The grain-doors, when at the top of the car, may be securely held there out of the way by a hook, *f*, locking into a staple on the upper section of d^1 .

"The great desideratum to be obtained in the use of a grain-door is that,

while it may serve its proper purpose when the car is loaded with grain, it may with facility be moved out of the way when the car is empty or loaded with other freight, without being detached from the car, whereby its loss or injury is rendered improbable; and it is always in such position that its use as a grain-door may be resorted to whenever needed. The bottom section, *d*³, of the door may be shod with an iron plate, to prevent injury thereto when being raised to allow of the egress of the grain.

"I am aware that a car-door of similar construction, sliding in grooved ways, is old, and such I do not desire to claim, broadly, as my invention. Said door, however, constitutes an outside or closing car-door proper, and the car could not be loaded or used for bulk grain, unless the grain is put in from the roof of the car, as the door completely closes the door-way or opening. Furthermore, said door is obviously objectionable for other reasons, viz: the grain will lodge or get in the grooved ways in which the door slides, binding or locking it so as to prevent its being raised; and also, being an outside door, the grain pressing against it would force or bulge the door outward, producing a similar effect as the grain lodging in the grooved ways; whereas my door, being an inside door, and reaching the top of the door-way or opening, admits an open space at the top for loading in the grain, with an ordinary outside door, to be locked or otherwise secured after the car is loaded. By also employing guiding-rods for the door to slide upon, and being an inside door, the defects incident to the grooved ways and an outside door before referred to, are entirely obviated."

The record shows that the complainant's application for a patent was rejected, and after amendment was again rejected by the examiner, because it did not present patentable novelty over Crooker's patent, granted 10 years before; but on appeal the examiner in chief reversed this decision, saying:

"The invention in this case is small, and the claim is correspondingly limited. It consists of a combination of various instrumentalities not found in either of the references. Applicant's car, as a whole, is adapted, by convertibility, to uses not compatible with the cases cited, without injury. In this case, the flexible door is applied in addition to the usual slide-doors; and, where coarse freight is to be carried, the flexible shutters are secured in place at the top under the roof of the car."

Counsel for complainant, as understood by the court, in both his oral and printed argument, admits or concedes that the sliding door, described in his patent, does not differ essentially from the sliding door described by Crooker, but insists that the patent consists in the combination in an ordinary freight car of the solid sliding outside door and an inner flexible door. In his brief he says that "until the date of Watson's invention nobody conceived the idea of combining in the same freight car a flexible grain-door with a solid outside door." I do not think this a proper construction, nor, if it were, that the patent could stand upon it. There is nothing in either specification or claim concerning "*ordinary* freight cars," nor *solid sliding* outside doors, and in the claim nothing about *outside* doors at all, unless inferred from the description given of an *inside* door. If, however, such an inference is permissible, and the patent must or may be construed to consist in such a combination of inside and outside doors, as is asserted, it cannot be upheld, because it does not involve invention, but

consists in a mere aggregation of parts, each to perform its separate and independent function, substantially in the same manner as before combination with the other, and without contributing to a new and combined result. The outside door certainly remains unaffected in construction and in use; and the inner door is the same as the Crooker door, with a few slats left off, or taken off, by design, or by accident; and whether done in one way or the other, the change cannot reasonably be called invention, unless the distinction between mere mechanical skill and inventive genius is to be disregarded.

Flexible and rigid doors, outside and inside doors, were all known; and rigid doors, outside and inside, had been used in combination, the inside door being made to fill only part of the opening in order to facilitate the loading of grain; and yet it is now insisted that the mere substitution, in this known combination, of the flexible sliding inside door, in itself not new, constituted invention. If that is the meaning of the decision of the examiner in chief, with due respect, I am constrained to dissent. If it be conceded that the complainant's "car, as a whole, is adapted by convertibility to uses not compatible with the cases cited without injury," the adaptation, so far as it consists in the combination of the inside and outside doors, of whatever form of construction, was either not new, or, if new in respect to the use of the flexible door, did not involve invention. It is not true, however, that this convertibility to different uses is confined to the complainant's car. The Crooker car, in a measure, manifestly has the same capability, whether it has ever been so used or not. In the first place the Crooker door, as described in his specifications, and as shown in the model, is constructed and moved in grooves on the inside of the car, and therefore may be used with an outside door. It is not liable, under pressure of the grain, to bulge outward, as suggested in complainant's specification; and it is evident that one of these doors (although filling the entire opening) might be used as an inside grain-door upon any car, the grain being loaded from the opposite side, over another door filling only part of the opening; and, with the grooves extended from one side to the other of the car, the single door could be shifted as convenience of loading and unloading should require. And if the Crooker door, at full height, can be so used upon either side of a car, and to that extent accomplish the same kind of results and advantages to a degree which are effected by the use of complainant's contrivance, it is plain that without invention it may be separated in the middle, and one piece used upon one side of the car and the other upon the other side. It is conceded, and whether conceded or not it is certainly true, that the Crooker door, made as described in his patent, may be used as an inside door, at the same time with, or in combination with, the ordinary outside door. The suggestion embraces nothing patentable, and, this much done, it is an easy process of reasoning—and reasoning is not invention—to extend the grooves continuously from side to side of the car, divide the

slatted door into two, and have the car used by the defendant, which is claimed to be an infringement. With the *Crooker* and *Clark* patents in view, and with a knowledge of the difficulties to be overcome, it is a plain process of reasoning, involving but moderate mechanical skill, to devise the defendant's car; and unless the complainant's combination embraces something more, it was not patentable.

Indeed, it seems to me too clear almost for discussion that if the complainant's patent can be upheld upon any construction whatever, it must be restricted to the particular devices described, combined in the manner stated in his specification; and, so restricted, even though it be deemed to embrace the outside as well as inside door in the combination, it has not been infringed, because the inside doors used by the defendant are held and moved in grooves, without the presence or aid of the rods and staples which are described as a part of the complainant's device, and expressly embodied in his claim. It may be that there is no essential difference, mechanically, between the grooves and the rods and staples; but, if so, the complainant is estopped from saying it, because he has expressly claimed one and disclaimed the other; and this alone is a sufficient ground to rest the decision of the case upon. By the terms of his specification and claim he has made the rods and staples a part of his combination, and has expressly disavowed the use of grooves as an equivalent, and consequently may not now, whatever otherwise might have been his right, insist that the grooves are an equivalent of the rods, or that the rods and staples are not essential to his combination. This being so, the defendants have not used the entire combination, and consequently have not infringed.

Bill dismissed.

ROEMER v. NEUMANN.

(Circuit Court, S. D. New York. March 29, 1885.)

PATENTS FOR INVENTIONS—VIOLATION OF INJUNCTION—SUIT FOR INFRINGEMENT.

Where a defendant has infringed a patent after the granting of an injunction in a suit by the patentee, the fact that the patentee might, if he chose, proceed against him for contempt in violating the injunction awarded in the former suit, will not affect his right to sue for such infringement.

In Equity.

Briesen & Steele, for complainants.

Betts, Atterbury & Betts, for defendant.

WALLACE, J. The infringement of complainant's patent by the defendants, since the interlocutory decree in the suit between the same parties in the district of New Jersey,¹ creates a new cause of action

¹ 19 FED. REP. 98.

in favor of complainant, and he can proceed at law or in equity to enforce it. His right to do this is not impaired by the circumstance that he can also, if he chooses, proceed against defendants for contempt in violating the injunction awarded him by the decree in the former suit. The plea of another suit pending is bad.

THE NEREUS.¹

THE JAMAICA.¹

NASSAU FERRY CO. v. THE NEREUS, etc.¹

METROPOLITAN S. S. CO. v. THE JAMAICA, etc.¹

(District Court, S. D. New York. March 5, 1885.)

1 COLLISION—SIMULTANEOUS WHISTLES—ANSWER—INSPECTOR'S RULES—DEPARTURES.

Steamers must be held to the same care and skill in the use of their whistles as in the use of the helm or engine. In the night-time, when the puffs of steam that accompany steam-whistles cannot be seen so as to correct any imperfections in the hearing of simultaneous signals, pilots have no right to rely upon simultaneous signals as an "answer" to each other under the inspector's rules. They are not an equivalent to an "answer," because attended by uncertainties in hearing, to which an "answer" is not subject. Departures from the rules are at the risk of those who adopt them.

2. SAME—CROSSING COURSES—CONFUSION OF SIGNALS—CASE STATED.

As the steamer N. was coming down the East river, shortly after dark, the ferry-boat J., about 400 yards ahead of her, left her slip, in a strong flood-tide, to cross from Brooklyn to Houston street, New York, and gave the N. a signal of two whistles in order to go ahead of the N. The N., at about the same instant, gave one whistle to the J., meaning that the J. should go astern. The court found that one blast from each boat was drowned by the other's whistle, so that the J. did not hear the N.'s one whistle at all; and the N. heard only the J.'s last blast about a second after her own, and treated it as an assent to her one whistle to go astern. The N., a few seconds after, gave a signal of two whistles to some other boats much further down river, which the J. interpreted as an assent to her own previous signal of two whistles, and went ahead. A collision ensued. Held, that the collision was due to the confusion and misunderstanding of signals; and, specially, to the N.'s last two whistles which induced the J. to go ahead; that the N.'s pilot knew, or ought to have perceived, that the J.'s one whistle, heard by him about a second only after the N.'s one whistle, came too quick to be a possible answer to his own whistle, but must have been a contemporaneous, original signal from the J.; that the liability of simultaneous signals in the night-time to be imperfectly heard made it incumbent on the N.'s pilot to repeat his signal, and to "answer" the known original signal of the J., as required by the inspector's rules, and also bound him to take special caution not to mislead the J., as he did, by giving, unnecessarily, the two whistles to the other distant boats, at the moment when an answer to the J. was due; and that the N. was answerable for these faults in the use of her whistles.

3. RULE 20—KEEPING OUT OF THE WAY—BURDEN NOT SHIFTED BY ASSENTING WHISTLES—DANGEROUS MANEUVERS.

Two whistles given in reply to a signal of two whistles from a steamer bound

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

to keep out of the way, mean only assent to the latter's course, at her own risk, and an agreement to do nothing to thwart her. It does not relieve the latter of her statutory duty to keep out of the way. But when collision becomes imminent, both are bound to do all they can to avoid it, whether the previous signals were of two whistles or one. If imminent risk of collision is involved in the maneuver assented to, and the maneuver was unnecessary, both are responsible for agreeing upon a hazardous attempt.

4. SAME—MISJUDGMENT OF DISTANCE.

The J. being by rule 20 bound to keep out of the way, and being safe at her slip, *held* that, considering the nearness of the N., it was rash and unjustifiable in the J. to leave her slip and attempt to cross the N.'s bows, even on apparently assenting signals, because thereby a collision could not be avoided, except by the N.'s immediately stopping and backing, a concession not implied by assenting signals, and one so unusual and extraordinary in a large steamer having the right of way that the J. had no right to exact or to expect it; that the J. was liable for attempting this maneuver unnecessarily, and in violation of her duty to go to the right; that the attempt was based on a great misjudgment as to the distance of the N., for which the J. was also responsible.

5. SAME—IMMATERIAL FAULTS—SUBSEQUENT CORRECTION—BURDEN OF PROOF.

The rule that previous faults, not directly involving risk of collision, will not be deemed proximate or material if, notwithstanding such faults, there was ample time and opportunity to avoid the collision by the use of ordinary skill and judgment, has no application to situations almost *in extremis*, or within the limits of an excusable error of judgment. The burden of proof is upon the vessel that seeks to exempt herself from the consequences of a previous fault, to show timely notice to correct it and ample means of doing so by the use of ordinary judgment and skill. The N. not having proved such means at the time of her subsequent one whistle to the J., *held*, that both steamers were in fault, and the damages were divided.

In Admiralty. Collision.

The above cross-litigations were filed by the respective owners of the steam-ship Nereus and the ferry-boat Jamaica, to recover their damages arising out of a collision between these boats in the East river, about opposite North Second street, Williamsburg, at about half past eight o'clock, on the evening of June 6, 1883. The ferry-boat was crossing from Grand street, Williamsburg, to Houston street, New York, nearly directly opposite. She was not quite half-way across the river, and was still heading slightly up stream, when she was struck by the stem of the Nereus on the axis of the shaft of her starboard wheel-house, and her machinery immediately stopped, broken, and twisted, causing large damages, for which \$10,250 is claimed. The stem of the Nereus was twisted by the blow to starboard, and her alleged damages amount to upwards of \$5,000. At the time of the collision the tide was strong flood; the evening mild, a little hazy, but otherwise clear; the wind light, from the south-west, and it was not yet quite dark.

The Nereus was a wooden-built right-handed propeller of 1,167 tons, 228 feet long, and 40 feet deep, bound from Boston to New York by way of Long Island sound. In coming down the river, she passed a short distance to the eastward of the Tenth-street buoy, and thence, upon her usual course under a wheel slightly ported, she headed a little towards the New York shore, being a little upon the Brooklyn side of the middle of the river. Shortly before the Jamaica left her slip, the ferry-boat George Law left the slip adjoining to go to Grand

street, New York. She drifted up the river somewhat with the strong flood-tide, and crossed the course of the Nereus at the estimated distance of 150 to 200 yards below her. A few seconds afterwards the pilot of the Nereus, seeing the Jamaica moving out of her slip, gave her one whistle, indicating that she should go astern of him. According to the testimony of the Nereus, one blast of the whistle of the Jamaica was heard in reply, and only one. But the testimony of several witnesses from the Jamaica shows that the signal given by the Jamaica was a signal of two blasts, and that no whistle at all was previously heard from the Nereus. Directly afterwards the Nereus gave a signal of two blasts of her whistle designed for the ferry-boat *Commodore*, the companion of the *George Law*, which had left the Grand-street ferry, New York, and was then about half a mile below coming up the river on the New York side. These two whistles were understood by the Jamaica as an assent to her own previous signal of two whistles given to the Nereus. As the Jamaica went out of her slip, the strong flood-tide swept her bows as usual up the river. She started with engines at full speed, and with a wheel hard a-starboard, as usual at that time of tide, so as to counteract as quickly as possible the upward sweep caused by the tide. According to the testimony for the Nereus, when the Jamaica was about 150 or 175 feet above the Grand-street pier, and about 150 feet out from the end of it, and when her bows were pointing directly for the Nereus, the latter again gave one blast of her whistle, to which the Jamaica immediately replied with two blasts, and kept on at full speed, under a hard a-starboard helm as before. The Nereus, upon signaling the *George Law*, had slowed her engine and continued under a slow bell until the contrary signals above stated, when her engines were stopped. A few seconds afterwards the Jamaica gave several short blasts of her whistle as a danger signal; whereupon the Nereus reversed, full speed, as soon as possible, and her engine was backing at the collision. Her own witnesses testify that at the time of the collision she was going backward by land, so that the street lights of North Second street, which had before been passed and closed in, again opened before the collision, as the Nereus receded backwards. Whether this was, in fact, before the collision, or after, is doubtful. The flood-tide was then running at the rate of about three or three and a half knots. It is not claimed that the Nereus had any backward motion through the water.

On the part of the Jamaica it was contended that the Nereus at the time of the collision was still going forward by land, and struck the Jamaica with great force; that her port wheel thwarted the effort of the Jamaica to keep out of the way; that the exchange of contrary signals took place when the Jamaica had nearly reached the line of the course of the Nereus; that the two whistles given by the Nereus directly after the two whistles of the Jamaica, on starting from the slip, justified the pilot of the Jamaica in his belief that they were de-

signed as a reply to the previous two whistles of the Jamaica, and bound the Nereus to act accordingly; and that had the Nereus thereupon either not ported or reversed in time, as she might easily have done, the collision would not have happened.

Wm. G. Choate, for the Jamaica.

R. D. Benedict, for the Nereus.

Brown, J. The direct cause of this collision was, doubtless, the confusion and misunderstanding of whistles. Taking all the evidence together, I have no doubt that the pilot of the Nereus gave one whistle only to the Jamaica when she started from her slip, and heard one, and only one, blast in supposed reply; thereby understanding that the Jamaica would go to the right and astern of him. Neither have I any doubt that this signal of one blast from the Nereus was not heard on the Jamaica; nor that the Jamaica, on starting, did give two blasts of her whistle, indicating that she would pass ahead and not astern, and that she almost immediately afterwards heard two whistles from the Nereus apparently in reply, which she had a right to understand as an assent and agreement to this mode of passing each other. Thus the whistles, as *heard* by each, and supposed to be in reply, were in fact directly contrary to those actually given and intended by each for the other; and this mistake, as I have said, was evidently the principal cause of the collision. That this mistake actually occurred on both sides does not rest upon the naked statements of the witnesses as to the whistles given and heard. The navigation of each vessel at the time was clearly in accordance with the signals as heard from the other; while, on the other hand, it is not credible that either vessel would have maneuvered in the way she did, had the signals of the other been heard and understood as given and intended.

As this mistake in the whistles led to the collision, it is necessary to inquire by whose fault the mistake arose. If it arose through any negligence of the pilot of either in attending to the whistles of the other, or in managing his own whistles, such negligence would be necessarily held a fault. In a crowded harbor like this the use of signals is indispensable. They constitute a language by which navigation is controlled. They are one of the chief means adopted in order to avoid collisions. Necessarily, they control and supersede, in some degree, the general rules applicable in the absence of signals; and, considering what is at stake in life and property, it is manifest that due care, attention, and skill are as necessary in the use of signals as in the use of the helm, engine, or sails; and any negligence as to the former is as perilous and as blamable as negligence in regard to the latter. The Jamaica had no lookout forward, but her pilot in the pilot-house above had the Nereus in full view from the start. He was giving attention to her, and heard her two whistles directly after his own; so that there is no reason for supposing that the single whistle of the Nereus, which was given after he started, was not heard in consequence of any want of a lookout forward, or of any inatten-

tion on his part. On the Nereus there was a proper lookout, both forward and in the pilot-house, and yet only one blast of the Jamaica's whistle was heard, although two were given. The failure of each to hear one of the blasts of the other was doubtless the result of a single cause, all the requisite conditions of which here existed, and which may be explained as follows:

The Nereus was at that time probably about opposite North Fourth street, or between that and North Fifth street, and from 1,000 to 1,200 feet distant from the Jamaica. Sound will traverse this distance in a second or a little over. The ordinary signal blasts are about a second long; and where more than one is given, they are separated by about a second's interval. Each pilot testifies that his own first signal to the other was given as the Jamaica was just leaving her slip; the Jamaica's being given when her colored lights were just outside the rack. If the Jamaica's signal of two whistles was given one second before the signal of the Nereus, the Jamaica's first blast would reach the Nereus at the same moment with the one blast of the Nereus, and would therefore be drowned by it so as not to be heard. In the same way the single blast of the Nereus would reach the Jamaica so as to be exactly contemporaneous with the second blast of the latter, and therefore not heard at all on board the Jamaica; while the second blast of the Jamaica would reach the Nereus one second after her own single blast, and accord with the testimony of the Nereus that only one blast from the Jamaica was heard in reply. The two whistles immediately afterwards given by the Nereus, but designed for the Commodore and a tow half a mile down the river, would naturally be understood as a reply of the Nereus assenting to the Jamaica's signal of two whistles. I think the weight of evidence is that it was so near dark that puffs of steam accompanying the whistles could not be seen, and were not seen by either vessel. It seems impossible, therefore, to ascribe the mistake as to the signals heard to any negligence or inattention in the pilots. If this account of the failure to hear the whistles as given be correct, and no other has been suggested as possible, it necessarily follows that the second blast of the Jamaica's first signal must have been heard on the Nereus only about a second after her own single whistle. This was too soon to have been a possible reply to the signal of the Nereus, at the distance the two vessels were then apart. The time necessary to give signals and obtain a reply must have been perfectly familiar to the pilot of the Nereus, as a practical fact of constant observation; and it ought, therefore, to have been observed and noted by the pilot of the Nereus that the Jamaica's whistle could not possibly have been given in reply to his own; and if not given in reply to his own whistle, he had no right to accept it, or to act upon it as a reply.

It is immaterial, however, whether the explanation above given of the failure of each to hear the other's signal as actually given, be strictly correct or not. The evidence leaves no reasonable doubt of

the fact that one blast from each was drowned, so as to prevent the hearing of it by the other pilot, by his own whistle. Neither signal was, therefore, a reply to the other. Each was an independent signal given to the other; and in that sense they must be treated as contemporaneous signals. The two blasts from the Jamaica, given in the ordinary way, were so near together that the first blast being drowned by the single blast of the Nereus, her pilot, as I have said, must have known, or ought to have known, that the second blast, that came immediately after, could not possibly be an answer to the signal of the Nereus, but must have been an original, contemporaneous whistle of the Jamaica. The most simple illustration, such as two taps a second apart, will show even to one unfamiliar with such observations that a second whistle, so soon after the first, could not possibly have come as an answer to the first, a fifth of a mile distant. The fact, which the pilot of the Nereus must therefore be taken to have known, that the Jamaica's whistle was an independent signal, contemporaneous with his own, ought to have suggested to him, in the night-time, when no puffs of steam could be seen, that his own whistle might not have been heard at all, and that the Jamaica's signal might have been imperfectly heard by him. Ordinary prudence, therefore, required him to repeat his signal, and also carefully to avoid giving any different whistles to other boats at the same time that might mislead the Jamaica. Rule 2 of the inspectors' regulations expressly requires that steamers approaching, like these, in an oblique direction "shall pass to the right, and that the signals by whistle shall be given and answered promptly." Rule 6 requires, in general, an "answer" to all signals to each other, whether passing to starboard or port. See *The B. B. Saunders*, 19 FED. REP. 118. The pilot of the Nereus did not answer at all to the blast that he heard from the Jamaica; but at the time when such an answer naturally would and should have been given, he gave a signal of two whistles to other boats a considerable distance below. There was danger from the Jamaica, which was coming out of her slip and close at hand, unless an understanding with her were had at once; there was no present danger from the boats so far below, and no urgency for immediate signals to them. In this situation the Nereus was in fault for not answering the known original signal from the Jamaica, and for not repeating her former signal; and still more for giving the signal of two whistles designed for other boats, just at a time when an answer to the Jamaica's signal was due. These two whistles were calculated to mislead the Jamaica. They did mislead her, and induced her to go ahead, and thus brought about the collision. The pilot of the Jamaica, on the other hand, had no knowledge or notice of any previous whistle of the Nereus; he was therefore fully justified in treating her two whistles, coming immediately after his own, as intended to be a reply and an assent to his own signal of two whistles, authorizing him to go ahead.

It is urged, however, that contemporaneous whistles in the crowded

navigation of this harbor are of common occurrence; that they are constantly acted upon and treated as a compliance with the inspectors' regulations, requiring an "answer;" and that it is not necessary that the answer be given afterwards, but only that the two steamers shall agree upon the same signal. There was no evidence before me as to the actual practice of pilots on this subject. Doubtless, however, if the two vessels do really agree upon the same signal, and each understands and knows the agreement, the object of the rule is accomplished, and no harm could arise from the want of a literal observance of it by a strictly answering signal. In the day-time pilots watch the vessels they are signaling. By the accompanying puffs of steam, they see the whistles as well as hear them. They rely upon sight, also, to identify the whistle heard with the vessel that gives it. In the case of contemporaneous whistles they perceive and know, by means of sight, the whole signal given, whether fully heard or not. Thus sight, in the day-time, may possibly be relied on to correct with certainty any imperfections of hearing. But in the night-time there are no such means of correcting any imperfect hearing of contemporaneous whistles. When known to be contemporaneous, the liability of misunderstanding in the night-time, through imperfect hearing, is manifest. The object of the inspectors' regulations is to give each steamer knowledge—i. e., a certain knowledge—of the intended movements of the other. To allow contemporaneous whistles in the night-time to stand as "answers" to each other, when the signals under such circumstances are necessarily liable to be wholly or partly drowned by each other, and therefore imperfectly heard, would be to sanction a departure from the rules requiring answering signals that would defeat their very object. The undoubted rule of law is that every departure from the literal observance of prescribed regulations is at the risk of the vessel adopting it. She must show affirmatively that her departure from the rule could have made no difference in the result. In the case of *The Pennsylvania*, 19 Wall. 125, 135, it is said: "The bark had no right to substitute any equivalent for the signal required by the navigation rules. In the case of *The Emperor*, [Holt, Rule Road 38,] it was said, 'It is not advisable to allow these important regulations to be satisfied by anything less than a close and literal adherence to what they prescribe.'" Had an *answer* been given by the *Nereus* as required, this collision would not have happened. Her previous contemporaneous whistle was not an equivalent, or a lawful substitute, for an "answer," in the night-time, as the circumstances of this case forcibly demonstrate. To sanction such a departure as a substantial compliance with the rule would be as contrary to legal authority as it would be dangerous in practice.

2. The *Jamaica*, having heard the two whistles by the *Nereus* as an apparent assent to her own, with no notice of any previous dissenting signal, is entitled to whatever benefit, as a defense, such assenting signal could give her; but it is not, in my judgment, sufficient

to justify her navigation. At the time she came out from her slip, the Nereus, as the weight of evidence shows, was not above 1,200 feet distant, or about off North Fourth street; or possibly a little above. The witnesses for the Nereus make her much nearer. In the strong flood-tide, the Jamaica would necessarily run up to North Second street, or at least half way up to the Nereus, before she could cross her course. The Jamaica, having the Nereus upon her own starboard hand, was bound to keep out of the way; and all she had to do to effect that was either to remain in her slip a half minute longer, or, if she started out, to go to the right, as required by the inspectors' regulations. By either course all danger would have been avoided.

The Jamaica's proposal to cross ahead of the Nereus in so short a space as was available to her was, therefore, clearly rash and hazardous. It was courting danger by running needlessly directly into it. Had the pilot of the Jamaica realized how near the Nereus was, his starting out of the slip and proposing to run ahead of her, without the slightest necessity or occasion for doing so, must have been judged unjustifiable and foolhardy in the extreme. His proposal to do so, by the two whistles given, was, however, based upon a wide miscalculation as to the distance of the Nereus at that time. He testifies that he judged her to be opposite North Eighth or North Ninth street, or nearly twice the distance she actually was. He is responsible for so great an error in judgment. The Nereus was in fact so near that any attempt to pass her bows in that manner was dangerous and unjustifiable, whether on agreed signals or not; and if there had been actually assenting signals between the two vessels agreeing upon this mode of passing each other, it would have been at the risk of both, because a grossly hazardous undertaking, adopted without necessity, and in direct disobedience of the rule to go to the right. *The City of Hartford*, 11 Blatchf. 72, 75.

A steamer bound to keep out of the way of another steamer by going to the right, under the inspectors' regulations, has no right, when under no stress of circumstances, but merely for her own convenience, to give the other steamer a signal of two whistles, importing that she will go to the left, unless she can do so safely by her own navigation, without aid from the other, and without requiring the other steamer to change her course or her speed. Otherwise she would be imposing upon the latter steamer more or less of the burden and the duty of keeping out of the way, which by statute is imposed on herself. When two blasts are given under such circumstances, the steamer bound to keep out of the way thereby in effect says to the other: "I can keep out of your way by going ahead of you to the left, and will do so if you do nothing to thwart me; do you assent?" A reply of two whistles, in itself, means nothing more than an assent to this course, at the risk of the vessel proposing it. Such a reply does not of itself change or modify the statutory obligation of the former to keep out of the way as before, nor does it guaranty the

success of the means she has adopted to do so. *The City of Hartford, supra; The Vanderbilt*, 20 FED. REP. 650.

But from the moment that such an attempt apparently involves risk of collision, both steamers are equally bound to do all they can to avoid a collision; and under rule 21 they may each be bound to slacken speed, or to stop and reverse, according to the circumstances. But this general obligation under rule 21 applies equally whether the previous signals were of two whistles or of one. The precise acts which either is bound to do, when immediate danger of collision arises, must depend upon the particular circumstances, and of these circumstances the previous understanding as to the course or intention of each vessel is one of the most important. But where the circumstances are such that a course proposed by a signal of two whistles would, if assented to and adopted, require at once, as in this case, immediate and strong measures to avoid a collision, there can be no question that such a proposal is wholly unjustifiable, and a gross fault, when proposed by a steamer that is bound to keep out of the way, and is under no constraint of circumstances, but free to pursue other safe methods of doing so.

The *Nereus* was a large steamer coming down nearly in the middle of the river, and having the right of way. The *Jamaica* was in a safe place in her slip. Clearly, she could not be justified in starting out and crossing the *Nereus*' course, when this would almost certainly bring on a collision unless the *Nereus* should at once adopt the unusual and extraordinary course of immediately stopping and backing in order to let the *Jamaica* run ahead of her. The pilot of the *Nereus* clearly had no such expectation; for he supposed the *Nereus* far enough off to enable him to pass without any such extraordinary concession from her. The answer of two whistles did not, therefore, import to him any such concession. It was no part, therefore, of the supposed agreement between them, as the *Jamaica* actually understood it; and whatever be the fault of the *Nereus*, it does not exempt the *Jamaica*.

As respects the charge of fault against the *Jamaica*, the only inquiry is whether she did perform, or could perform, the apparent agreement as she actually understood it, and had an apparent right to understand it. Her supposed agreement by the two whistles imported, as I have said, that she would avoid the *Nereus* by going ahead of her, if the latter did nothing to thwart her. The slight porting of the *Nereus* was not, in my judgment, sufficient to affect the result; and the *Jamaica* did not and could not avoid her in the way she proposed and undertook. Had she appreciated the actual nearness of the *Nereus* at the time when her signals were given, that course would not have been proposed by her; because her pilot would have known that it was clearly hazardous, and that it involved an unjustifiable interference with the *Nereus*' right of way, and an imminent risk of collision, unless the *Nereus* immediately stopped and backed,—an ex-

traordinary maneuver, which, under the circumstances, the Jamaica would have no right to ask, or to seek to impose upon her. Tested by what her pilot actually judged and understood, the Jamaica cannot be justified; because she did not and could not keep out of the way of the Nereus by going ahead of her, though the latter did nothing to thwart her; but, on the other hand, gave her some aid by backing, which the Jamaica did not expect, and had no right to exact. And, on the other hand, if judged according to the fact of the actual nearness of the Nereus, the Jamaica is responsible for gross error in judgment as to the distance of the Nereus, and for undertaking a most hazardous maneuver, in violation of the regulations requiring her to go to the right, without any exculpating reasons for such a course.

3. On the part of the Nereus, however, it is claimed that, though she be treated as having originally agreed to the Jamaica's proposal, because her two whistles might have been so understood by the Jamaica, still, the whole damages from the collision should be charged upon the Jamaica, because after the Jamaica had got out into the stream the Nereus gave her a signal of one whistle to go astern, and that there was then sufficient time and opportunity for the Jamaica to do so; but that, notwithstanding, the Jamaica rashly persisted in her original attempt, replied again with two whistles, and kept on with unabated speed until the collision took place. If the evidence fairly warranted this contention, and showed clearly that there was abundant time and opportunity after this last signal whistle of the Nereus for the Jamaica to go astern of her, and that that course would, without question, have been adopted under the circumstances by a person of ordinary skill and judgment, then the question would be fairly presented whether the Jamaica under such circumstances should be charged with the full responsibility. Previous errors, indeed, not directly but only remotely connected with the collision, are deemed immaterial when there is ample time and opportunity to correct these faults, and when the collision, notwithstanding such faults, might have been avoided by the use of ordinary skill and judgment. This may, perhaps, be accepted as a substantially correct statement of the rule of law. *The Dexter*, 23 Wall. 69, 76. The only difficulty lies in its application. Substantially the same rule has frequently been applied in this court in cases of vessels navigating in parts of the river forbidden by statute. *The E. A. Packer*, 20 Fed. Rep. 329; *The Maryland*, 19 Fed. Rep. 556, and cases there cited. See, also, *The Eliza & Abby*, Blatchf. & H. 435, 442; *The Union*, 2 Biss. 18. The same rule has recently received a very interesting discussion in the house of lords in the case of *Cayzer v. Carbon Co.* L. R. 9 App. Cas. 873, where the same result is arrived at, reversing the decision of the court of appeal. But in all these cases the facts were clear, and the proximate cause of the collision and its remote cause were separated by a very clear and broad line of division. But where the earlier cause and the later cause are both proximate and direct,

both vessels are liable; for it is unreasonable that a fault in one vessel tending directly to a specific collision should go blameless, merely because it was the first fault, or merely because the other vessel did not do all that she might have done to avert the consequences of the other's fault. In such cases both are deemed in fault, and the damages are divided. *The Sapphire*, 11 Wall. 164; *The A. Denike*, 3 Cliff. 117, 122; *The Commerce*, 3 W. Rob. 287; *The Sunnyside*, 91 U. S. 208, 214-223; *The Pegasus*, 19 FED. REP. 46.

Unfortunately, however, the evidence of the different parties bearing upon the application of this principle in this case is in irreconcilable conflict. If the evidence on the part of the *Jamaica* is regarded as approximately true, her situation when the exchange of contrary whistles took place was a situation *in extremis*, in which the collision could not possibly have been avoided by her through any attempt to stop or go astern.

In applying the above rule in particular cases, whenever it is sought to relieve a vessel from the consequences of a previous fault tending to produce a collision, the burden of proof is certainly upon her. She must satisfy the court beyond any reasonable doubt, not merely that the collision, notwithstanding the previous fault, might possibly have been avoided by the other vessel, but that the mode of avoiding it suggested was timely, and would have been adopted, under the particular circumstances, by a pilot of ordinary skill and judgment. The rule certainly has no application to a situation *in extremis*; nor can it be justly applied where the situation is such, all the circumstances being considered, that any reasonable doubt might exist as to the best course to be pursued on the part of those in charge of the other vessel. In short, all situations in which the final failure to avoid the collision comes within the limits of excusable error of judgment by persons of ordinary skill and coolness, must be excluded from the application of this rule. A vessel which has brought another, either wholly or partly by her own fault, into a dangerous situation, must bear the responsibility of a mere error of judgment made subsequently in the endeavors to avoid a collision. This is a familiar rule applied to errors *in extremis*. *The Genesee Chief*, 12 How. 461; *The Favorita*, 18 Wall. 603; *The Elizabeth Jones*, 5 Sup. Ct. Rep. 468; S. C. 112 U. S. 514.

At the time of the last contrary signals, the evidence on the part of the *Nereus* is to the effect that she was off North Second street, about 850 feet from shore; and that the *Jamaica* was about 150 feet out from her pier, and about the same distance above it, and about 500 feet distant from the *Nereus*, and heading for the latter's pilot-house. According to the *Jamaica's* evidence she was at the time of these two whistles about one-third of the way across the river, and within from 100 to 200 feet of the line of the *Nereus's* course, heading nearly across the river. There are such difficulties in reconciling the relative situation of the two boats, as alleged by the *Nereus*,

with the other testimony of her own witnesses, as well as such improbabilities attending it, that I am obliged to reject it as altogether mistaken. If the relative situation of the two boats was such as the Nereus alleges, it would, moreover, seem almost incredible that the pilot of the Jamaica, on hearing the signal of one whistle from the Nereus, should not have acquiesced, replied with one, and immediately ported his wheel. In the situation alleged that alone would probably have easily carried the Jamaica astern of the Nereus; if not, backing, in addition, would most certainly have done so. This mode of avoiding danger was so evident, and the risk of the opposite course so great, that the pilot of the Jamaica, with his long experience, is fairly entitled to the benefit of the *prima facie* assumption that he would not have persisted upon a course evidently hazardous upon contrary signals when there were so simple means of escape.

It must be borne in mind that the time that elapsed between the collision and the time when the Jamaica gave her first whistle as she was passing the end of her pier did not probably exceed one minute; for from that point to the place of the collision, about 850 feet off North Second street, she traversed, even in her winding path, not exceeding 900 feet. The tide during this time would set her up 300 feet; and, very shortly after starting at the full speed of her engines, she had acquired her full headway of from eight to nine knots. From the other testimony it is evident, also, that the first whistles between the Nereus and the Jamaica were not more than a quarter of a minute after the signal given by the Nereus to the George Law. The signal to the George Law was given just as the Nereus had cleared the Tenth-street buoy, which is opposite North Sixth street, and in range between that and Tenth street, New York, and is upwards of 1,000 feet above North Second street, the place of collision. If the second whistle to the Jamaica was given when the latter was but 150 feet above her pier, it must have been given in less than half a minute after her first whistle, and the Nereus could not have then reached North Second street where her captain alleges she then was, unless she had been going during this half minute at the rate of 12 knots, which was at least double her actual speed by land. Her captain testifies that he slowed as he passed the Tenth-street reef, on signaling the George Law, and was previously going at the rate of about five and one-half knots by land. The pilot of the George Law testifies that when the Nereus whistled to the Jamaica, the Nereus was "a little below Tenth street." This would place her bows certainly above North Fourth street when she first signaled to the Jamaica; and during the minute that followed, until the collision, she must have traversed upwards of 400 feet. The position thus assigned her is, I think, indirectly confirmed by the testimony of the Tenth-street pilot, who testified that she was in the range of North Sixth street when the whistles of the Jamaica were given. I think he is mistaken as to the whistle he refers to, and that it was the whistle given

to the George Law, and not that given to the Jamaica, that was then given. Thus interpreted, it certainly confirms the other testimony to the effect I have stated.

But not only is it impossible that the Nereus could have got down to North Second street by the time the Jamaica was some 200 feet only from her pier, but in that situation, and with the previous understanding, to which the pilot of the Nereus testifies, that the Jamaica was going astern of him under an understood signal of one whistle, there was no reason for the Nereus to repeat her previous signal, as there would then be no reason to suppose the Jamaica would not go astern of him in accordance with that supposed understanding. Again, he says that when he gave two whistles to the Commodore,—the first heard by the Jamaica,—he shut off steam at the same time. This would be an unaccountable order, so far as I can understand, in that situation. Finally, he testifies that the order to reverse the engines was given when the Jamaica's two whistles were heard, his boat being then "at a dead stop," and that his engine backed from one to one and a half minutes before the collision. The engineer estimates that he got about 45 revolutions backward, her previous speed forward being 56 revolutions to the minute. All these statements I am obliged to deem mistaken, because incompatible with the other testimony concerning the relative situations of the Nereus and the George Law, as to which there is less liability to mistake in the testimony. The distance even between the George Law and the Nereus, as the former passed, is probably estimated by Capt. Lockwood too small when he states it at 500 or 600 feet. If the Nereus was then just passing, or had just passed, the Tenth-street buoy, as Capt. Coleman states, and as is confirmed by the Tenth-street pilot, then the bows of the Nereus must have been at least 750 feet distant from the George Law. The Jamaica passed nearly in the track of the George Law; that is, probably not over 100 feet above her, and certainly not more than one and one-fourth or one and one-half minutes behind her. The pilot of the Jamaica says that when he started from his slip, the George Law was about one-third of the way across the river. The rest of the testimony agrees with this, as a rough estimate. Had the Nereus been slowed, stopped, and backed in any way approximating that testified to on her part, prior to the collision, she could not have traversed the distance that separated her from the George Law in the short interval up to the time when the Jamaica passed a little above the George Law's track.

On the other hand, supposing the Jamaica to have crossed the line of the Nereus 100 feet higher up the river than the path of the George Law, the Nereus must have come down the river from 400 to 600 feet to reach the point of collision; and assuming that the Nereus slowed as she passed the Tenth-street buoy and whistled to the George Law, as her pilot testifies, in order to have reached the point of collision at all, she could not have commenced backing until a very few

seconds before the collision. It may be assumed as natural and probable that, upon the contrary signal of two whistles given by the Jamaica, and the several toots signifying danger that immediately followed, she did begin to back; and as this, for the reason above stated, could not have been but a few seconds before the collision, it follows that the Jamaica must have been far more nearly in the situation alleged by her own witnesses than in that testified to by the witnesses of the Nereus. This is further confirmed by the nature and extent of the damage done both to the Jamaica and to the Nereus. It is difficult to believe that so serious damage would have been inflicted on both if the Jamaica was merely drifting up with the tide, and if, as the Nereus alleges, she herself was also backing by land. The injuries were such as would seem only probable if the Nereus still had a considerable forward motion by land. In referring to these various details in which I think the testimony on the part of the Nereus is mistaken, I design no reflections upon the general integrity of her witnesses. The time and space within which the occurrence took place were so small, and the changes so rapid, that these mistakes are easily accounted for by erroneous recollection as to the sequence of events merely, and as to the precise order of similar occurrences.

The situation of the two vessels at the time of the contrary whistles, as stated by the witnesses on the part of the Jamaica, while not agreeing in minute particulars, are, nevertheless, in the main consistent. If the Jamaica was only from 100 to 300 feet to the eastward of the line of the course of the Nereus, and the Nereus was under considerable headway, as their witnesses assert, and as I think the other evidence justifies, then there was no chance of escaping a collision at the exchange of contrary whistles, except possibly by the Nereus' star-boarding. Had this been done, as I think the Nereus could not have been then backing, her bows would have swung to port, and might possibly have escaped the Jamaica.

The testimony of the witness Lockwood, the pilot of the George Law, is such as to suggest great doubt in my mind whether the contrary signals he refers to were really the first or the last. He speaks of the contrary signals attracting his attention. Now, the first exchange of whistles between the Nereus and the Jamaica were really contrary whistles. He was as near the vessels then as he was afterwards, and no reason appears why he should not have noticed those whistles as well as the latter contrary ones. He says these two whistles from the Jamaica were just as she got out of her slip, and that is about where she was when her first two whistles were given to the Nereus, and those first two would have been audible to him. In interviews had with him at the time, and in his recollection afterwards, he was in evident perplexity in regard to the whistles heard. It is pretty clear either that he did not hear both sets of contrary whistles, or that he got them in some way confounded in his recollection. He considered that the Jamaica ought to have stopped and

backed at the time he heard the contrary whistles. But this judgment was based upon the position of the Jamaica at that time in his mind as being near to her pier. That was her situation at her own first two whistles. On account of this evident confusion, and the perplexity which marks his testimony, as well as his readiness to accede to the statement made by the officers of the Jamaica's line at the time of the transaction, no conclusive weight can be given to his testimony.

For these reasons I do not think the Nereus has sustained the burden of proof that is upon her, to absolve herself from her previous fault by showing that her subsequent signal of one whistle was given in sufficient time to charge the whole blame for not complying with it upon the Jamaica. But the previous fault of the Jamaica being also clear, the damages must be divided between them.

THE MANGALORE.

(District Court, D. California. December 5, 1882.)

SHIPPING—LIABILITY OF SHIP FOR DAMAGE TO CARGO—BILL OF LADING—EXCEPTED PERILS.

On examination of the evidence, *held*, that the vessel was liable for the damage to the cargo.

In Admiralty.

William Barber, for libelants.

Milton Andros, for claimants.

HOFFMAN, J. After some hesitation I have reached the conclusion that the claimants have not, by a preponderance of proofs, shown that the damage to the goods was caused by one of the excepted perils. A very attentive examination of the log-book has led me to the opinion that the voyage was perhaps of less than ordinary severity, and if the weather and seas encountered by the Mangalore can be received as an excuse for bringing into port a cargo so extensively damaged as this was, and for decks in the condition in which her decks were found, almost every ship that comes around the Horn could set up a similar excuse. The court is asked to infer "straining" from the condition of her decks alone, no other trace of it being elsewhere visible, so far as disclosed by the proofs, and this in the face of testimony by very competent experts (though it is not contradicted) that no iron vessel could strain so as to open her seams as those of the Mangalore were opened, without showing the effects of it in her rivets. I cannot exonerate the ship on the ground that some of the damage was caused by her hatch being stove in by a sea, for several reasons:

1. The damage, if any, from this cause cannot be distinguished from damage from causes for which the carrier is responsible.

2. The construction of the hatch seems to have been faulty. Very considerable additions to its strength were ordered by the surveyor, and in fact made, before she was permitted to sail from this port.

3. I do not believe that any appreciable amount of water could have been admitted to the cargo through the hatch, inasmuch as the tarpaulins with which it was covered were intact and were in fact retained in use when she sailed from this port.

One undisputed fact seems to have some significance: no one on board appears to have had the least suspicion that the ship had strained so as to open her seams and admit water to her cargo until after her discharge had been commenced. The usual washing of the decks was continued even after her arrival, and until it was discovered that the water leaked freely into her hold. The theory that she had "strained" appears to have been then for the first time adopted. It does not appear that any examination of her planks and rivets was made, which on that theory would be natural, if not indispensable. All that was done of any consequence was to repair and strengthen her hatch and recalk her decks.

I think the libellant is entitled to recover.

THE MANGALORE.

(District Court, D. California. June 12, 1883.)

SHIPPING—INJURY TO CARGO—MEASURE OF DAMAGES—REBATE AT CUSTOM-HOUSE.

Where a cargo has been injured by the negligence of the vessel, the measure of the damages is the difference between the market value of the damaged goods at the time and place of delivery and what their value would have been if uninjured, less any rebate allowed at the custom-house.

In Admiralty.

William Barber, for libellants.

Milton Andros and *Charles Page*, for claimants.

HOFFMAN, J. The only question raised by the exceptions which, as it appears to me, admits of doubt, is whether the damage to the shipment was confined to 164 bales, or extended to the whole consignment. Mr. Gallego wishes it to be understood that the damage estimated by him at one and three-quarters to two cents per bag pervaded the entire lot of 300 bales, containing 1,000 bags each. But his testimony is quite obscure, and his memory by no means distinct. His examination of the shipment was made in conjunction with the customs officers, who took, as their duty required, notes of the results of their inspections in order to determine the rebate of duty to be al-

lowed on the damaged appraisement. There does not appear to have been at the time any difference of opinion between them and Mr. Gallego as to the results of the survey. There was allowed at the custom-house a rebate of \$1,016 on the duties otherwise leviable on 164 bales. The remainder were charged the full duty as on sound, dutiable value. No objection or protest appears to have been made by the shippers, and the duties were adjusted and paid on this basis. The prices subsequently obtained (though not until the next season, and after certain expenditures made by the shipper for repacking, repairing, etc., were incurred) tend to strengthen the impression that the damage was subsequently confined to the 164 bales. Accepting, then, Mr. Gallego's estimate of damage per bag to 164 bales, or 164,000 bags, as one and three-quarters, we have total damage of \$2,870. The payment of this sum would have placed the owner in the same condition as if his goods had arrived sound; but by reason of their damaged condition he was able to obtain them by the payment of duties less by \$1,016 than he would otherwise have paid. Deducting this sum from \$2,870, we have \$1,854, which, with interest, is the damage sustained. The commissioner has reached substantially the same conclusion by computing the difference between the sound market value of the goods (eight and seven-eighths cents per bag) and the market value of the 164 injured bales, (seven and four-tenths cents per bag.) This amounts to \$1,049, and to this he has very reasonably added \$200 as an allowance for bales damaged to so small an extent as under custom-house rules is not considered. This allowance would amount to nearly 2 per cent. on the sound, duty-paid market value of the remaining 136 bales constituting the balance of the shipment.

I think the sum of \$1,854, with interest from August 8, 1881, allowed by the commissioner, is as just and reasonable an estimate of the damages as can be arrived at.

OLYPHANT v. ST. LOUIS ORE & STEEL Co. and others.¹

(Circuit Court, E. D. Missouri. March 26, 1885.)

1. PARTIES—FORECLOSURE SUIT—MORTGAGE ON PROPERTY NOT EMBRACED IN MORTGAGE TO COMPLAINANT.

B., a corporation, mortgaged its property to X. Subsequently it consolidated with the owner of some mining property, and the consolidation was called C. C. gave a mortgage upon all its property to Y., and afterwards gave a mortgage to Z. upon all its property except that covered by the mortgage to X. Upon default Z. instituted foreclosure proceedings against B., and made X. and Y. parties. Upon X.'s demurring, *held*, that he is a proper party.

2. MORTGAGES—SEPARATE FORECLOSURE PROCEEDINGS BY PARTIES HOLDING MORTGAGES ON DIFFERENT PIECES OF PROPERTY.

Seemle, that though X. is a proper party to said suit, he is entitled to leave to institute separate foreclosure proceedings and have the property covered by his mortgage sold by itself, in the absence of equitable reasons estopping him from insisting on such right; and the fact that some of the principal bondholders under the first mortgage have mining property which is in interest antagonistic to the mining property belonging to the consolidated company, does not constitute any equitable reason for denying them that privilege.

In Equity. Foreclosure suit. Demurrer to bill.

E. T. Allen, for complainant.

Noble & Orrick, for demurrants.

BREWER, J., (*orally*.) In the case of *Olyphant against Ore & Steel Co.*, where a demurrer has been filed by the trustees of the first mortgage, a mortgage given by the old Vulcan Company upon its plant in south St. Louis, the facts are that in 1875 the Vulcan Company, owning the plant here in south St. Louis, executed a million dollar mortgage to Edgar and Lackland, trustees. That mortgage covered its property, and it had but this property. The bonds secured by that mortgage become due on the fifteenth of next month. The interest due last fall is unpaid. Some years after that mortgage had been given, the mortgagor consolidated with the owner of some mining properties, thus forming the "Ore & Steel Company." That consolidated corporation bound itself to pay the mortgage on this south St. Louis plant. After the consolidation, a mortgage was given to the Farmers' Loan & Trust Company, a New York corporation, on the entire properties. Subsequent thereto a mortgage was given to Messrs. Olyphant and Hitchcock on the properties, excluding the property in south St. Louis, upon which the old Vulcan mortgage was given. So it stood in this condition: The Farmers' Loan & Trust Company had a mortgage on all the properties, a mortgage subsequent to the Lackland mortgage on the property in south St. Louis, and prior to that to Olyphant and Hitchcock on all except the south St. Louis properties. Now, while the mortgagees in this first mortgage are not necessary parties, yet it would seem to us that they were proper parties; that the Farmers' Loan & Trust Company mortgage is a connecting link that

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

binds the interests all together; for, when this Vulcan property is sold to pay its first mortgage, if there be a deficiency, whether that deficiency stands as an indebtedness against the other property, subordinate to the mortgages already existing thereon, or prior thereto, is a question which of course ought to be determined, and will affect the value of these mortgages and the property sold. So, as far as the demurrer is concerned, we think it may be properly overruled. But the question that lies back of that, perhaps the real and substantial question in the case, is whether these first mortgagees of the south St. Louis property should be delayed in the foreclosure of that mortgage, and compelled to abide the sale of the entire properties, and as an entirety.

Generally speaking, if a mortgagee loans money on a single piece of property, he has a right when default comes to have that property by itself sold, and for obvious reasons. Take the case at bar. Here is a mortgagee who loans a million of dollars on manufacturing property. Default has occurred. Why should he not be at liberty to foreclose his mortgage on that property on which he made his loan, if it fails to pay his debt? He may say, "I will take that property." Why should he be compelled to put his hands in his pocket and advance two or three millions more to buy other properties, which he may not want, which he never loaned his money on, and which he had no thought of at the time he made his loan. He dealt with the mortgagor owning the particular piece of property; he made his loan upon that particular piece of property; and now says to the mortgagor, it not paying: "I want the property sold; if I have to buy it in, well and good. At any rate, I don't want to be mixed up in the other matters, and have that property put up for sale with a large bulk of property which I may not be able to buy, and which I might not want to buy if I was able." It seems to us that he would have such a right as that, unless, of course, as Mr. Allen suggested, there may be equitable reasons estopping him from insisting on such right. In the case at bar, the bondholders, represented by the mortgagee in the first mortgage, may have so conducted themselves at the time of consolidation in respect to it that there may be equities against their apparent present right. But if there be such equities, they are not now disclosed to us. It stands before us simply upon the fact that here is a mortgage upon a single property, given before any other properties belonged to the mortgagor, which has come to default, and which the mortgagee says he wants to have sold to pay the debt.

It has appeared incidentally, in the course of this litigation, that some of the principal bondholders in this first mortgage—this Vulcan mortgage—have mining properties, or ore properties, which are in interest antagonistic to the ore properties which belong to this consolidated company. So be it. I do not see any equitable reason, in that, why they should not have this manufacturing property on which they loaned sold. Very naturally, if they have ore properties, they

may say, "We don't want any of the ore properties of this Ore & Steel Company. All we do want is this manufacturing property, and that we loaned our money on, and that we can, if we buy, unite with our ore properties, and thus make those properties valuable." So, whatever conflict of interest there may be between the ore properties now held by the Ore & Steel Company and those owned by the bondholders in the original Vulcan mortgage furnish no ground for saying, "You cannot buy this manufacturing property without you buy the entire properties subsequently accumulated by the mortgagor." Hence, we say, while the demurrer to the bill is overruled, there is also a petition for leave to foreclose that prior mortgage speedily, and the order will be that, unless by the eighteenth of April reasons are shown which make it inequitable,—something which raises what you may call an equitable estoppel on the mortgagees,—they will be permitted to proceed with the foreclosure of that separate mortgage upon the Vulcan property,—the south St. Louis property; such foreclosure and sale to be subject to the order of the court, in order that there may be nothing done which will go against the equities of any of the parties connected with this Ore & Steel Company. Whatever may be said, as was said by counsel, as to the default in interest last fall having been brought about by the action of these bondholders in issuing attachments and other proceedings, even assuming they were guilty of wrong in that, now the principal is due, and certainly they ought not to be deprived of or postponed as to that because of any interference which they may have been guilty of in respect to the mere matter of interest six months ago.

My brother TREAT suggests, and I think the interests of all parties will be promoted in so doing, that in view of what has been decided, and with the expectation that the property will be sold at an early day, full notice should be given immediately, and the information disseminated, so that all parties interested in such properties may commence to make arrangements accordingly.

Mr. Noble. Do I understand notice of foreclosure under the deed?

The Court, (TREAT, J.) No. The suggestion is this: The order of the court, as stated by Brother BREWER is, unless by the eighteenth of April the principal and interest is paid, you proceed to foreclose according to the terms, but in the mean time—and it is a mere suggestion—let it be known that the property will be in the market, by advertisement.

Mr. Noble. The Bessemer steel process belongs to the Vulcan property, and is to be sold at the same time. The order should include that, that the property may be sold together with the Bessemer steel process.

The Court, (TREAT, J.) Your right to do that?

Mr. Noble. I will prepare an order in regard to that.

Mr. E. T. Allen. If I understand the suggestion of the court, it was, unless cause was shown by the eighteenth of April why some such order should not be made, on that day that such an order would then be made. I apprehend there will be cause shown before that time why such an order should not be made, and that we will ask the court to consider. If I understand Judge BREWER, if we do not, there will be an order entered as of this date in reference to this transaction?

The Court, (BREWER, J.) It makes little difference which way you get at it. The order goes, unless good reasons to the contrary are shown.

Mr. Noble. I understand it to be that it is now ordered, unless cause be shown on or before the eighteenth of April next to the contrary, that the trustees, Lackland and Edgar, have leave to proceed to sell under the powers of the deed of trust all the property therein described, together with the Bessemer steel process referred to in their application?

The Court, (BREWER, J.) So far as appears to us now, on the general legal rights of the parties, we think they have the right to proceed, and the order is that you go on, and give the other side to the eighteenth of April to make such a showing as would justify the court in postponing the proceedings.

Mr. Allen. Permit me to call your honors' attention to the fact, so far as the plaintiff in this case is concerned in this Bessemer process, the demurrer was the only matter before the court at the time of the hearing. No arguments, in effect, were addressed to your honors in reference to this particular subject-matter, in regard to which the court has made a limited order. I only desire to call the attention of your honors to the fact that the reasons urged hitherto by the complainant why such course should not be taken, were not brought to your honors' attention.

The Court, (BREWER, J.) You have until the eighteenth of April to bring it to our attention, if the matter don't appear on record. The matter is in the hands of the court until that time.

WELLS, FARGO & CO. v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Oregon. November 19, 1884.)

1. EXPRESS COMPANY—RIGHT OF WELLS, FARGO & CO. TO DO BUSINESS IN WASHINGTON TERRITORY—REV. ST. U. S. §§ 1924, 1889.

A corporation, created under a special act of Colorado, whereby it is authorized to engage in the express business, and to draw drafts and bills of exchange, or sell and buy the same, in the course of such business, is not prohibited (Rev. St. U. S. §§ 1924, 1889) from carrying on such business in Washington Territory on the ground that it is a banking corporation or that it was not organized under a general incorporation law.

2. SAME—"INDUSTRIAL PURSUITS."

The express business is an "industrial pursuit" within the meaning of Rev. St. U. S. § 1889.

3. SAME—EXPRESS FACILITIES—DUTY OF RAILROAD COMPANY—COMPLIANCE WITH STATE LAWS BY EXPRESS COMPANY.

It would seem that a railroad company cannot refuse express facilities to an express company on the ground that it has not complied with the laws of the states or territories in which it demands such facilities.

4. SAME—INTERSTATE COMMERCE.

An express company that is engaged in transportation from one state to another, is engaged in an interstate commerce, and no territory or state can impose upon it any conditions by way of license, or otherwise, to engage in this commerce by passing through its limits, but such company will have no right to do a mere local business within a state or territory without complying with the territorial or state law.

5. SAME—NORTHERN PACIFIC RAILROAD COMPANY—MANDATORY INJUNCTION.

Wells, Fargo & Co. v. Oregon Ry. & Nav. Co. 8 Sawy. 600, S. C. 15 FED. REP. 561, followed as to the duty of a railroad company to furnish express facilities to an express company, and a mandatory injunction granted, requiring the Northern Pacific Railroad Company to furnish such facilities to Wells, Fargo & Co. on its road, from Oregon to St. Paul, Minnesota, and connecting lines, as it furnishes other express companies, on condition that Wells, Fargo & Co. execute a bond for \$25,000 to pay all costs, charges, and damages which the railroad company may incur.

In Equity. Suit for injunction.

This cause came on to be heard on the bill and answer thereto, and the affidavits of plaintiff and defendant, upon motion for a preliminary injunction to compel the defendant to furnish the plaintiff express facilities over its lines of railway northward between Portland and Tacoma, and eastward between Wallula junction and St. Paul.

M. W. Fechheimer, for plaintiff.

James McNaught and *C. B. Bellinger*, for defendant.

DEADY, J., (orally.) This is a suit brought to restrain or constrain the defendant to furnish the plaintiff with express facilities upon its railway from Portland to Tacoma, and from Wallula junction to St. Paul, and branches between those points. It is brought by Wells, Fargo & Co., a corporation organized by a special act of the territory of Colorado in 1866, whereby it is authorized to engage in the express business, and to draw drafts and bills of exchange, or sell or buy the same in the course of such business. The act itself, section 1, provides:

"That Ben Holladay, David Street, Bela M. Hughes, S. L. M. Barlow, and John E. Russell, and their associates, successors, and assigns, be and they are hereby declared to be a body corporate and politic, by the name of the Holladay Overland Mail & Express Company, and by such name shall have continual succession, with power to sue and be sued, plead and be impleaded, complain and defend in any court of law or equity; to adopt and use a common seal, and change the same; to purchase, hold, mortgage, and convey any estate or property, real or personal, for the use and benefit of said corporation; to take, to hold, and dispose of any mortgage on real or personal estate; to establish, maintain, and operate any express, stage, or passenger, or transportation route or routes, by land or water, for the conveyance of persons, mail, or property of any kind, from, to and between any place or places in Colorado territory, and any place or places beyond the limits thereof; to erect, or hire and maintain warehouses or other structures for the safe keeping of goods, wares, merchandise, or other chattels or effects, and the transaction of business; and for the purpose of facilitating exchange between the several places at which said corporation may transact business, the said company shall have power to draw, accept, indorse, guaranty, buy, sell, and negotiate drafts and bills of exchange, inland and foreign; to receive coin, money, silver, and gold, in any form or other, and any kind of valuables on deposit at its offices, and make orders for the payment and delivery of the same, or an equivalent, at any other place whatsoever; to buy, sell, and dispose of gold and silver coin and bullion, gold-dust, money, and securities for money, and to do a general exchange and collection business; and to invest surplus or unemployed funds in bonds or notes, secured by mortgage on real estate, stocks of the government of the United States, of any of the United States, or otherwise, as the board of directors may designate."

The bill alleges that this plaintiff has been in the express business in Oregon, Washington, Idaho, Montana, and places to the eastward thereof, for many years; that the defendant is furnishing express facilities to the plaintiff over its road from Kalama northward, and from Wallula junction eastward to Missoula; but that it has refused, and still refuses, to furnish express facilities over its road to the plaintiff from Portland to Kalama, and from Missoula eastward. The answer of the defendant substantially admits the facts upon which the plaintiff grounds its right; that is, the incorporation of the plaintiff, its express business, the ownership and operation of the Northern Pacific Railway and its branch lines by the defendant, and the refusal on the part of the defendant to furnish express facilities to the plaintiff within or between the points named. But, as a defense or reason for this refusal, the defendant sets up several matters; and, first, it says plaintiff is a banking corporation, and by section 1924 of the Revised Statutes it is prohibited from doing business in Washington Territory, and therefore, as an express company, cannot come into that territory; nor can it rightfully or lawfully demand any privileges or facilities or conveniences from the defendant over its railway lines within that territory. Section 1924, of the Revised Statutes referred to, is section 6 of the act of March 2, 1853, (10 St. 172,) organizing the territory of Washington, and it provides:

"The legislative assembly of Washington shall have no power to incorporate a bank, or any institution, with banking powers, or to borrow money in the

name of the territory, or to pledge the faith of the people of the same for any loan whatever, directly or indirectly. No charter, granting any privileges of making, issuing, or putting into circulation any notes or bills in the likeness of bank-notes, or any bonds, scrip, drafts, bills of exchange, or obligations, or granting banking powers or privileges, shall be passed by the legislative assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in the territory; nor shall the legislative assembly authorize the issue of any obligation, scrip, or evidence of debt, by the territory, in any mode or manner whatever, except certificates for service to the territory."

In *Rapalje & L. Law Dict.*, under the word "Bank," occurs this definition of a bank:

"(1) A place for the deposit of money. (2) An association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue promissory notes payable to bearer, called 'bank-notes.' (3) The building, apartment, or office where such business is transacted. Banks are of three kinds: banks of deposit, which include savings banks, and all others which receive money on deposit; banks of discount, being those which loan money on collateral or by means of discounts of commercial paper; and banks of circulation, which issue bank-notes payable to bearer. But the same bank generally performs all these several operations."

Now, I think it is too plain for argument that the plaintiff is not a bank or a banking corporation in any of these senses; though it is undoubtedly true that it possesses some of the powers or facilities which may be used by a bank, and are commonly used by banks in the transaction of business; still, banking is not the object of its incorporation. The object of its incorporation is the transportation of packages, including money, from place to place; and, so far as money is concerned, this is also done at this day by telegraph, bills of exchange, drafts, and otherwise. It may be very convenient and very proper for Wells, Fargo & Co. to receive \$1,000 in gold to be transmitted to New York, and to do so by giving a draft on New York, or by making a telegraphic transfer, and then transporting the coin to New York at its convenience, or keeping it here, if that should be more convenient, for the time being. I do not think I can better dispose of this objection than in the language of Mr. Justice GREENE, in the able and exhaustive opinion (1884) delivered by him in the case between these same parties in Washington Territory. He says:

"It has been stated in argument that plaintiff is doing a purely banking business at different points in the United States, notably at San Francisco and New York city. Possibly, it may be doing what is beyond its lawful powers. The prime object of its pursuit, according to its charter, is not banking, nor the doing of those things wherein banks and bankers are principally or peculiarly engaged, but the reception, transmission, and delivery of parcels and values, and executing other commissions. For a person whose proper vocation is not that of a banker to do for himself, solely in furtherance of his own particular vocation, the things that a banker does, is not 'banking,' nor is it, as it seems to me, the exercise of 'banking powers.' If plaintiff, under its charter, does things that banks do, it does them as ancillary to its main business, just as a merchant incidentally, in his own behalf,

in his mercantile transactions, may do every one of those things which plaintiff is empowered to do, and yet do them without being in name or fact an expressman or a banker. Not for the purpose of doing a banking business in any phase, but 'for the purpose of facilitating exchange between the several places at which said corporation may transact business,' are the particular powers of plaintiff given.

"For the safe and convenient transmission of value, and for no other purpose, a token of value is taken from a sender at one place, and a corresponding token is produced to a recipient at another place. It is all the same as if a parcel of goods to be sent were received at one end of a line of transportation, and a like or equivalent parcel were, by consent or stipulation of the shipper, to be delivered at the other end. A business consisting of such details is not 'banking,' nor are powers limited to carrying it on 'banking powers.' In one department or another of banking the receiving of deposits, or the buying and selling of gold and silver and mercantile paper and securities, or the drawing, paying, and collecting mercantile paper, is the principal thing, and the exchange of values between localities, thereby sometimes effected, is subsidiary or accidental; but in this part of the express business the principal thing is the transfer of value from place to place, and the buying, selling, drawing, paying, collecting, depositing, and receiving are all accessory. Every milling, or mining, or other productive corporation, has to do some or all of these things for the convenience of itself in its own business, to a greater or less extent, and if it could not, would be cramped almost or quite to death. Between such a corporation and plaintiff there is a difference arising from the fact that the requirements of plaintiff's business make the doing of such things a matter of great convenience and frequency, and so prominent and important as to deserve especial mention and definition in the charter. But in the particular now under discussion, the two are otherwise alike.

"I do not understand that congress demands or contemplates that section 1924 be so applied as to bar out from our territory any foreign corporations except those who carry on a business in which the things essential to banking are done for banking's sake, or, in other words, as the main, as distinct from an incidental and ancillary, affair. Only such are banks, or have the power to do banking. Wells, Fargo & Co. is not, in my opinion, though it may be in its own, a corporation of that description. See *People v. River Raisin, etc.*, R. Co. 12 Mich. 389. Looking further at this section, the intent of it seems to be, not to exclude a corporation simply because so fortunate or unfortunate as to be clothed with banking powers, or powers used in banking, even so as to be exercised in chief, but rather to exclude one exercising or claiming to exercise them in fact. The section seems to be leveled, not at abstract or dormant power, but at actual deed or endeavor. In the record before me there is nothing to show that plaintiff is doing or undertaking anything unlawful. It is not under compulsion of any absolute necessity of its express business to exercise the interdicted powers. Values can be expressed between distant places without traffic in precious metals or valuable paper. If such traffic be unlawful for plaintiff, it is freely, though perhaps not conveniently, separable from plaintiff's business. And, although one may say that it is to be presumed that plaintiff is doing all that its charter purports to authorize, and that is convenient to be done, yet the stronger and overcoming presumption is that it is not disobeying any law, organic or otherwise."

I think myself that, apart from the question as to whether this corporation can be abstractly called a "bank" by virtue of its act of incorporation and powers conferred by that act, the only question, if

there be any question, is, "What are the powers it is exercising in this territory, and what is the business in which it is engaged?" It may have, in my judgment, many interdicted powers, or more than one, considered with reference to the locality of Washington Territory; but if it goes there, exercising only the powers which are permitted as to the interdicted ones, they do not exist. Whoever alleges it is exercising, or attempting to exercise, interdicted powers, and, therefore, is unlawfully in that territory, must prove the allegation to be true. There is no presumption, as Mr. Justice GREENE says, that "it is there, violating or intending to violate the laws of the territory."

Another objection is made to the relief demanded in this bill, on the ground of the inability of the plaintiff to exercise the powers claimed by it in Washington Territory; and that is, that it is created by a special act of Colorado. This objection is founded upon section 1889 of the Revised Statutes, which is applicable to all territories, and reads as follows:

"The legislative assemblies of the several territories shall not grant private charters or especial privileges; but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association."

Now, it is argued, first, that because a corporation cannot be organized in Washington Territory by a special act of the legislature, but must be organized under the general law, therefore a corporation existing before this restriction was made, under a special act of a sister state or territory, cannot come into that territory and exercise the powers, although they are in no way excluded by the law of the land, or contrary to the public policy. The ground is that it is not brought into being in the peculiar or particular way in which the general law now requires corporations to be formed in Washington Territory; but I cannot see that there is anything in this objection. There is nothing in this section (1889) to prevent any corporation exercising its powers in Washington Territory in particular cases. Everybody who is familiar at all with the history of the growth and organization of corporations in the United States knows that this rule, requiring corporations to be organized under a general law, is the growth of some years, and has grown out of the confusion, corruption, the partial and inequitable legislation that was the result of allowing parties to go before the legislature, and ask for a special charter. The time of the legislature was unnecessarily consumed by it; the integrity of the members of the legislature was unduly exposed; or, through the ignorance or carelessness of the legislature, and the astuteness and diligence of designing and overreaching men, there were constantly coming to light obscure clauses in these acts of the legislature, giving

powers and granting privileges which were unjust, inequitable, and which would never have been done with the knowledge of the legislature.

Therefore, owing to the evils resulting to the territory of Washington, to the people, and to the legislature, this act was passed, and has no reference whatever to the fact whether a corporation, otherwise formed, might exercise powers in that territory not prohibited or contrary to its public policy. It is a matter of no moment whatever to Washington Territory, that corporations in Colorado are created by special act. The people of the latter territory are not corrupted by it; the legislature is not corrupted by it; their time is not taken up with it. The only interest that they have in the matter is the interest that any portion of the people in the United States have in the welfare of all the other people in the United States. See, also, on this point, the remarks of Mr. Justice FIELD in *Cowell v. Springs Co.* 100 U. S. 59. With reference to the effect of this limitation upon the power to form corporations within the territory, I quote again from the opinion of Mr. Justice GREEN:

"Again, defendant urges that, under the second clause of section 1889, the territorial legislatures can, by general incorporation acts, authorize the formation of corporations for those purposes only which are specified in that clause; that plaintiff is not a corporation within the limitation, unless its business be an industrial pursuit; that to be within the limitation its business must be, not only industrial, but of a character like mining and manufacturing; that its business is neither of that character nor industrial; and that, therefore, since its like could not, by private or general statute, be formed within the territory, its admission to do business in the territory is prohibited by the spirit of the section. But this clause refers merely to the formation of domestic corporations, and has nothing to do with domestic recognition of foreign corporations. Besides, I think plaintiff's pursuit is industrial. It is such, according to ordinary usage of words."

It is objected that this corporation is unable to come into Washington Territory to do business there, because it is not a corporation engaged in "industrial pursuits." The objection hinges about these words: What is the character of "mining, manufacturing, and other industrial pursuits?" It is maintained that this express company is not engaged in an "industrial pursuit;" and that if it is engaged in an industrial pursuit in the abstract sense of the words, it is not engaged in such an industrial pursuit as mining and manufacturing; and that the words "industrial pursuit," being coupled with "mining and manufacturing," are restricted in their signification to the general scope covered by those words, "mining and manufacturing." I think, myself, that this is entirely too narrow a signification to be given to those words. "Industrial" is a very large word, and, although it is associated with the words "mining and manufacturing," it would be, it seems to me, contrary to the manifest purpose of congress in this passage, to so restrain it as that the pursuit must be literally, or almost literally, a mining one or a manufacturing one.

Could not a corporation in Washington Territory be formed under this law to engage in raising wheat? This is neither mining nor manufacturing in any literal sense of the word; it is producing. Could not a corporation be formed under this law, or under a law passed by Washington Territory, to engage in navigating Puget sound? I do not think there is a specific provision for a navigation company; there are for wagon roads and railroads, but there is none for steam-boats. But I suppose it is hardly questionable that the legislature might provide, by a general law, for the incorporation in Washington Territory of a company to navigate Puget sound. An "industrial pursuit," it may be said also, in the case I put of farming, is covered by the words "colonization, and improvement of lands in connection therewith;" but these are limited by the words "railroads, wagon roads, irrigating ditches," and it is doubtful whether the colonization of lands, and the improvement of lands, standing by itself, includes farming, raising wheat, flax, hops, and corn.

I want to add here that I am not prepared to say that this section (1889) expressly, or by fair construction, prevents the territory of Washington from providing for the incorporation of a company to carry on an express business within its limits; but that it is a sufficient indication of the public policy, by the law-making power of that territory, to overcome the presumption that, by comity, this plaintiff is allowed to transact its business there. I repeat, if this act could be fairly construed as inhibiting the legislative assembly of Washington Territory from providing for the incorporation of an express company in that territory, I think it would be such a manifestation of public policy by the law-making power (the supreme power there) as would exclude this plaintiff from doing business in the territory; at least, on the ground of comity. It would have no right, as a matter of comity, to do a business there, as a corporation, which the territory itself is prohibited from authorizing a corporation to engage in. But I think the express business is an industrial pursuit, and one which the territorial legislature could provide for the formation of corporations to engage in.

The next objection to this relief is that the plaintiff has not complied with the laws of Washington, Dakota, Montana, and Minnesota, the state and territories through which defendant's road runs, concerning express companies doing business therein, and that, therefore, it has no right to enter these places, and cannot complain if it is not allowed express facilities upon defendant's road therein. To begin with, I have a very strong impression that it does not lie in the mouth of the defendant, a corporation engaged in the business of a common carrier, to say to this plaintiff, "You have not complied with the laws of these territories concerning the transaction of business therein." It does not seem to me that it is a matter which concerns the defendant. It does not seem to be a matter that the defendant can judge of; and I think the case I put to counsel on the argument has not

been answered; that is, supposing the law of Washington Territory provides that no person shall be engaged in peddling jewelry in that territory unless he has taken out a license and paid for it, and a person with pack upon his back, peddling jewelry, offers to go on board of defendant's train, having purchased a ticket for that purpose, can the defendant object and say: "You are a peddler, peddling without a license; you have no right here; we cannot carry you." I do not think the defendant can. The matter is one for the state or territory, and not the defendant. However that may be, I think the burden of proof is upon the defendant to show that the plaintiff is not qualified to act as an express company within these territories. I think that if the plaintiff failed to comply with any particular required by the laws of these territories, that the burden of proof is cast upon the defendant to show it. There is no presumption that the plaintiff has not complied with the law; as all men are presumed to obey the law and comply with it, until the contrary is shown. The plaintiff alleges in its bill that it has complied with the law. The defendant alleges in its answer that the plaintiff has not complied with it, but does not state wherein the plaintiff has not complied with it.

The defendant alleges that the plaintiff has not complied with the law, but does not state wherein. The affidavits in support of plaintiff's bill, made by its manager and officers, who ought to know whereof they speak, are clear, full, and explicit, and are to the effect that they have complied with the law, and on the argument it was substantially admitted by counsel for defendant that the plaintiff attempted to comply with it, but, in his judgment, there was some technical defect which was not very particularly stated. I apprehend it is not a very serious matter. I shall assume, then, that these laws have been complied with, and that, therefore, as far as that objection is concerned, it has no weight. But supposing that none of them had been complied with by the plaintiff, or that plaintiff had not undertaken to comply with them. Plaintiff is engaged in an interstate commerce. There can be no commerce without transportation. Transportation is one of the essential elements of commerce,—the means by which commerce is supported. The plaintiff is engaged in transportation between these points, and is engaged in an interstate commerce, and in my judgment no territory or state can impose upon it any conditions, by way of license or otherwise, to engage in this commerce by passing through its limits. Of course, the right to engage in interstate commerce is not a right to do a local business within the territory, and therefore the plaintiff has no rights to do an express business in Washington, Idaho, Montana, and Dakota, if it has not complied with their laws. But if it has an existence, and is authorized generally to do express business, it may do it, so far as interstate commerce is concerned, without reference to these laws. I think this is very clear both on the authorities and the reason of the case. The

case of *Pacific Coast Steam-ship Co. v. Board of R. Com'rs*, 18 FED. REP. 10, is a case directly in point.

I have not been able to come to any definite conclusion how far the legislation of congress on the transportation of dutiable goods affects this question. It seems that in 1870 congress passed an act to facilitate the transportation of dutiable goods from the ports of entry on the sea-board to important points in the interior. It has amended the act once or twice since,—once in 1880 and once in 1884. By the act of 1880 Portland was made one of the points from which goods from foreign ports might be transported in bond to the interior without paying duty at this point; and by the act of 1884, in addition to the provision that whoever undertook to carry these goods should be treated and considered as a common carrier for that purpose, it was expressly provided that they might be carried by express companies in such boxes or safes as they usually had or furnished for like articles. The act goes upon the assumption that an express company is a safe mode of conveyance, and a recognized mode of transporting such things, without special provision as to what should be the character of the vehicle, the box, or safe. How far that should be considered a regulation of commerce, under which this plaintiff may carry goods from Portland to St. Paul, irrespective of any inimical or restraining legislation of the territories between Portland and St. Paul, I am not prepared to say. It is not necessary to decide it, though the inclination of my mind is that it has some effect upon the matter in favor of the plaintiff.

The next objection is that the defendant is not able to furnish the facilities, admitting that plaintiff has a right to them. Upon this phase of the case counsel for the defendant, with his usual ability and zeal, insists that, if there is a conflict of evidence upon that point, the court is powerless to act, as it is not at liberty to weigh evidence,—to decide either from the number of witnesses on the one hand, and the scarcity on the other, or from the inherent probability of the testimony, or from the circumstances which are commonly known to all men, or altogether, but is powerless to act from the simple circumstance that there is a conflict of testimony in the affidavits concerning this question of its ability to furnish these facilities. I understand counsel to maintain that this proposition extends to any material question, that may arise on the application for an injunction, that is involved in the conflict of evidence,—one against a thousand although it be; that in such case the court has not the power to act, particularly in the case of an application for a mandatory injunction. I must admit that this doctrine is new to me. I do not think it can be found in those words, or anything like it, in the books; but I conceive the true doctrine to be that, where there is a conflict of evidence, the court must decide, and act according to the weight of evidence. But I can see very readily that the court might require more satisfactory and conclusive evidence in one case than another, owing to

the effect or consequence of its action. If its action were merely conservative, and could do no harm, it might be at liberty to act where there was a well-balanced conflict of statement. But if its action might seriously injure or inconvenience the defendant, it might very properly refuse to act where the evidence was at all equal and conflicting.

With this understanding of the rule of evidence in these matters, I now proceed to dispose of this point. There are two affidavits made by the officers of this defendant corporation. They state in so many words that the defendant is not able to furnish these express facilities, and goes on to say wherein they are unable to do so. They say, first, that it would require an additional car beyond Missoula for the plaintiff to do its business in, and they have none; that if an additional car is put on the train for the express company the weight of the train would be increased, and the propelling power is now so evenly balanced that, with an additional car, it would require another locomotive, and that would put the company to very considerable expense. I asked the counsel for the defendant, in the course of his argument, if he expected the court to believe that this defendant corporation, with all its power, wealth, and resources, was really unable to furnish an express car to this plaintiff, and the counsel, of course, had not the hardihood to state that he thought the court would be expected to believe it, but only that the defendant meant that to do it would take some little time. Of course, taking that view, the statement does not amount to much. It may be that defendant corporation has not a car which, at this moment, it can divert to the use of the plaintiff. But if it can supply a car in five or six or ten days, that is practically the same thing. In my judgment it can do so to-morrow if it wants to. The testimony on the part of the plaintiff shows that the car which is used by the plaintiff from Wallula junction to Missoula is carried from there to Helena empty, and there is no reason why it should not be used by the plaintiff to Helena, except the desire of the defendant not to allow the plaintiff to use it. Of course, when it reaches Helena the plaintiff is in the center of business of that country. It is in reach of another railroad, the Northern Utah, by means of which it has access to the Central and Union Pacific roads. The defendant allows the plaintiff to go to Missoula, and there requires it to leave the train, and the car is carried from there empty. In this connection it must be noticed, as a material circumstance, that there is a rival express company upon this road, the Northern Pacific Express Company, and it is manifest that the defendant intends to give the express business over its road to this company if it has a lawful right to do so.

In considering the question whether the defendant has furnished facilities to the plaintiff as it ought to, and whether it is able to do so, or whether this is an excuse for not doing what the law requires it to do, the Northern Pacific Express Company and its relations to

this defendant is a very material circumstance. One of the affidavits, stating that the defendant is unable to furnish an express car, is made by an officer of the defendant and of the Northern Pacific Express Company. The fact that its stock is owned largely by the men and people in the Northern Pacific Railroad Company, and is, in fact, its other self, is a very material circumstance. The defendant may have been advised that, being a railway corporation, it was not competent to do an express business, and therefore it has undertaken to do so as nearly as it can, and has formed a corporation for that purpose that is, in fact, itself. It is also stated in these affidavits that the plaintiff will not be injured if this relief is not granted, because the express business is overdone east of Missoula. There is such competition between the American Express Company and the Northern Pacific Express Company that they are carrying at losing rates. This is a matter which does not concern the defendant upon any theory in this case which can be taken into consideration. Whatever the fact may be in relation to the Northern Pacific Express Company, as to its connection with the Northern Pacific Railway Company, in the eye of the law it has no more relation to it than it has to the plaintiff; it has no more interest in one than the other. It is no matter to the defendant if they are both broken up in the express business, so that they pay for the services which they require. This is not a matter of any moment to the defendant. Nor is it probable that, if the defendant is allowed express facilities upon the defendant's train east of Missoula, there will be any need either of additional power or cars. It does not follow that any more business is going to be done. I will not say—I am not sufficiently well informed to say—that there would be no need of another car. It is not probable that the bulk of the goods transported would be materially increased. And there may be room for both companies in one car, if it would not be disagreeable to the employees. Instead of having separate cars, the one now in use might be partitioned.

The result would be that Wells, Fargo & Co. would have their share of the business, and what they would do the Northern Pacific Express Company would not do. There probably would not be any particular addition to the business. It would be distributed between the two companies. Wells, Fargo & Co., having been on the ground so long a time, and having now access to the business, would do its share of it, and by as much as it did, the Northern Pacific Express Company would do less. Besides, the plaintiff is not entitled to this injunction, except upon giving security to pay whatever is right; and it comes to this: that if the defendant has to put on another locomotive, or has to put on another car, it is one of the circumstances to be considered, and should be charged for. Of course, the main question in this case, as to whether the plaintiff is entitled to these facilities, and whether it is the duty of the defendant to furnish them, has been decided in this court in the case of *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*

8 Sawy. 600; S. C. 15 FED. REP. 561. It is not now proposed to consider that question any further. It is a serious question, and an important one, which awaits the final decision of the supreme court. If the ruling of this and other circuit courts is affirmed in the supreme court of the United States, the question is settled in favor of the plaintiff; if otherwise, of course the question is decided in favor of the defendant. But, for the time being, we go upon the assumption that the defendant is under obligation to furnish reasonable express facilities to the plaintiff, or any other express company that wishes to do business on its road.

Another point was made, and that was that this application has been delayed. This objection is made particularly with reference to the mandatory character of the injunction. But the delay in this case has not worked any prejudice whatever to the defendant; it has worked to its advantage, if it be an advantage to keep the plaintiff off its road. It has not changed its condition; it has not built up a wall which it has now to take down; it has not done anything which it would have to undo. In so far as it has had any effect, it has been to its advantage, if it be an advantage, as I apprehend it is, to keep the plaintiff off its road. The delay is more apparent than real. I think the fact is that the defendant has been operating this road about 14 months, and it appears from the affidavits in this case that the plaintiff commenced a suit in Washington Territory prior to that time, and maintained there until a short time since, when the defendant came into this state with its road from Kalama to Portland, whereupon the plaintiff commenced this suit, and shortly after dismissed the other. The delay is more apparent than real; but if there was an actual delay, there is nothing in it which can prejudice the defendant. If anybody has suffered by the delay it is the plaintiff, and not the defendant.

There is only one other question to be considered: that is, whether a mandatory injunction ought to be issued in a case of this kind; that is, so far as this is a mandatory injunction. It is laid down in Pom. Eq. Jur. § 1539, "that where the injury is immediate and pressing, and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff, a mandatory injunction ought to issue." An injunction, as an equitable remedy, has grown wonderfully in the last 50 years, and, of course, if we are to be guided by decisions and *dicta* prior to that time, the court would often fail to exercise this power where it is necessary. I think myself, with Prof. Pomeroy, that very much of the objection and argument that has been made against the allowance of a mandatory injunction in times gone by is simply absurd; and that it was absurd is manifest by the practice of the courts of evading the rule,—admitting it by mouth, but overruling it in act; that is to say, admitting that the authorities stated that a mandatory injunction ought not to be allowed, and at the same time enjoining a party to do some affirmative act in a negative form.

When the injury is immediate and pressing, and at the same time irreparable, and the right to relief is made out clearly upon the proof, there is no reason why a mandatory injunction should not issue. In this case, although the injunction is mandatory in form, it is in effect negative; it can do no harm to the defendant, even if it should turn out to be wrong. It is simply an equivalent to the ordinary provisional injunction. The defendant is engaged in operating this road; it is there for the purpose of carrying all express matter which can be gathered up and brought to it, to be carried between its *termini*. Considered as the Northern Pacific Railway, and not as a private partner of the Northern Pacific Express Company,—in which light we have no right to regard it,—considered simply as the Northern Pacific Railway Company, it is a matter of no particular moment to it whether the express matter is furnished by Wells, Fargo & Co. or by the Northern Pacific Express Company. Therefore the defendant cannot be injured, in any legal sense, if it be required to furnish these facilities to Wells, Fargo & Co., provided that Wells, Fargo & Co. give a bond to compensate the defendant in every respect for the reasonable expenses incurred in furnishing the facilities. Much of the law and argument on the subject of mandatory injunctions has very little application to this case, because while it is mandatory in form, it is hardly so in effect. It simply requires the defendant to do that which it ought to do,—to carry express matter if furnished by A. as well as by B., being paid for at the same rate, and making the same amount of money out of it.

These, I believe, are all the points made by counsel for the defendant in his elaborate argument in this case. I do not think he has left anything unsaid, or any stone unturned. The main question—as to the duty of the defendant to furnish plaintiff express facilities—I have passed on before; and the particular and peculiar ones made in this argument have been so thoroughly and well considered by Mr. Justice GREENE, in the case in Washington Territory between these same parties, that I might have contented myself by simply referring to his opinion, from which I have already quoted.

The order of the court will be that the defendant be required to furnish ordinary express facilities to the plaintiff on its road between Oregon and St. Paul, and connecting lines or links, whatever they may be, and to furnish the plaintiff such facilities as the defendant furnishes any other express company; and, in addition, that the plaintiff give a bond, to be approved by the master of this court, in the sum of \$25,000, to pay all costs, charges, and damages which the defendant may incur. I have fixed this sum, but if the counsel for the defendant thinks the sum ought to be greater, I will hear him now, or at any time. Possibly, at some future time, it may be necessary to increase the bond.

In re ANDERSON, a Bankrupt.*Ex parte* GIBBONY'S ADM'R.*Ex parte* KENT'S ADM'R.*Ex parte* SMITH and others, and other Petitions.

(District Court, W. D. Virginia. March 18, 1885.)

1. BANKRUPTCY—SCHEDULE—CREDITORS' BILL—WIFE'S PROPERTY.

In his schedule the bankrupt included his life-interest in lands inherited by his wife from her father. There was a question whether this was a life-interest by the curtesy, or a fee acquired by transactions which occurred between the administrator of the decedent and the bankrupt before the bankruptcy, and the co-heirs of the bankrupt's wife. After the commencement of the bankruptcy proceeding, certain creditors of the bankrupt filed a general creditor's bill in a state court, making the bankrupt, his wife, and his assignee in bankruptcy parties defendant; and therein sought to settle the title of the land received by the wife as her share in her father's estate. During the progress of this suit in the state court the wife was, while under moral duress and pressure, induced to sign an agreement jointly with her husband and the attorney of creditors that she would by deed relinquish her interest in three-fourths of her lands, and acknowledged it before the person who was to be her trustee in the other fourth; but this agreement was never recorded as the deeds of married women are required to be by the Code of Virginia; yet it was ratified by decree of the state court. *Held*, that the creditors' suit in the state court was *coram non judice*, and could not affect the bankrupt's estate, or the rights of any one having a "specific claim" upon it or any part of it, who, as this wife did, came into the bankruptcy proceeding asking protection. *Held*, that the bankruptcy court had exclusive jurisdiction to administer the bankrupt's estate, and to adjudicate between the assignee and any person having such "specific claim;" especially if that person came voluntarily into the bankruptcy court and asked for such adjudication. *Held*, that the written agreement signed by the wife to convey away three-fourths of her interest to save the other fourth, was void (1) because not signed by the assignee; (2) because the signing of it by the bankrupt was nugatory, he being *civiliter mortuus* as to the estate; (3) because it was executory and of the nature of a power of attorney, which a married woman is not authorized to execute by the Virginia statutes; (4) because it was acknowledged before an interested notary; (5) because it was not recorded in the manner required by statute. *Held*, that the assignee had no power to give consent to an extrajudicial decree of the state court, the laws of congress nowhere authorizing him to become defendant to a suit commenced *in novitiam* towards and essentially in conflict with the jurisdiction which the bankruptcy legislation of congress gives to the bankruptcy court.

2. SAME—WIFE AS WITNESS.

In proceedings in bankruptcy the wife of the bankrupt is a competent witness to facts affecting the estate in bankruptcy, and so is every party to any "trial or cause" arising under the bankruptcy act, (section 8, act June 22, 1874, amending section 26 of the general bankruptcy act.)

3. SAME—HUSBAND AS TRUSTEE.

Where a husband has by fraud or mistake been invested with the title in fee-simple of real estate inherited by his wife, equity will treat him as trustee of his wife, and a court of bankruptcy will refuse to subject the land to liens of the creditors of the husband who is a bankrupt.

4. SAME—LIMITATIONS.

The limitation of two years to suits brought by or against assignees against or by persons in adverse interest, provided in section 4979, Rev. St., applies to suits at law and in equity brought independently of and separate from the bankruptcy proceeding proper, on the common law or equity side of the courts entertaining them; but does not interfere with or limit the jurisdiction of the bankruptcy court to "ascertain and liquidate liens and specific claims, and to

adjust the various priorities and conflicting interests of all parties" to the bankruptcy proceeding proper. In these latter the bankruptcy court proceeds as directed by section 4972, without reference to the two-years limitation.

5. SAME—EFFECT OF BANKRUPTCY PROCEEDINGS.

The proceeding in bankruptcy is equivalent to the general creditors' bill in chancery, and is a plenary proceeding, its practice being prescribed by statute, and to that extent variant from the chancery practice obtaining in creditors' bills. So far as not varied by statute, the practice should be the same. The collateral proceedings incident to and arising in the course of a bankruptcy proceeding, in the form of petitions and motions *nisi*, against persons already parties to the bankruptcy proceeding, are of the same character as like collateral proceedings incident to and arising in a creditors' bill in chancery; and are summary, or not, only where they would be so in a creditors' bill, except where allowed by statute.

6. SAME—NEW PARTIES.

A stranger to a bankruptcy proceeding may come into it voluntarily, by petition or other plenary method, and submit to the bankruptcy court his rights touching property in the custody of the court, claimed as assets by the assignee in bankruptcy.

7. SAME—EFFECT OF PROCEEDING.

The petition of such a party, filed collaterally in a bankruptcy proceeding, calling for an answer, which answer is filed, and under which depositions are then taken and a hearing had, on a formal making up of issues, is a plenary proceeding and binds all parties to it.

8. SAME—BANKRUPTCY RULE 32—EQUITY RULE 88.

Under rule 32 in bankruptcy the practice in bankruptcy proceedings must be conformed, when practicable, to the practice in equity; and therefore, under rule 88 in equity, petitions for review in cases where appeals must be brought within the term of the court in which the decree sought to be reviewed was rendered; otherwise, petitions for review will not be heard by the bankruptcy court. Therefore, it is too late for a review of its own decree by a bankruptcy court when the petition for review is not filed within the term of the court at which the decree is rendered, and when an appeal could have been taken.

In Bankruptcy. On petitions for review.

Robert Stiles, for bankrupt's wife.

John J. Wade and *T. E. Sullivan*, for creditors and assignee.

HUGHES, J. The proceeding in bankruptcy of George W. Anderson was commenced on the twenty-ninth December, 1868, and the adjudication was made on the twenty-sixth January, 1869. The petition was filed at Richmond, in the district court for Virginia, when the state constituted but one judicial district. The proceeding went on at Richmond until the sixteenth June, 1881, when, under the act of congress approved on the third of February, 1871, providing for the division of the state into two judicial districts, it was removed into this, the Western, district of Virginia. The proceeding remained at Richmond 10 years after it could have been removed here. While at Richmond most of the proceedings in it were had under my supervision as district judge there. After it was removed, it came again, in consequence of the resignation of Judge Rives, under my direction during the period of about 13 months, when I was performing the duties of judge here. It is now before the court on petitions for a review of my decrees rendered here and at Richmond, and as such has come to me along with several other cases which were in my hands when my brother, the Hon. JOHN PAUL, became judge in this district.

A very large part of the estate surrendered in this proceeding consists of realty. What the bankrupt's interest was at the time of surrender, in the realty in which he had estate, is a subject of litigation. The realty surrendered consists of two pieces of land, one containing (at first 1,200, now) 1,100 acres, the other 335 acres. The 1,100 acre tract was the home place of Jacob Kent, deceased, who was the father of the bankrupt's wife, Mrs. Sarah J. Anderson. This home tract lies in the county of Montgomery, Virginia, in this judicial district, and on it the bankrupt, George W. Anderson, and Sarah J. Anderson, reside. They have it in actual possession, but, as to the bankrupt himself, it is in the constructive possession of his assignee in bankruptcy, John Gardner; C. B. Gardner, who was joint assignee, being now dead. One of the leading questions in this proceeding has been, whether the bankrupt had a fee-simple right in this 1,100 acres, or only a life-estate by the curtesy. The 335 acres of land surrendered in bankruptcy by George W. Anderson lies contiguous to the larger tract, which has been mentioned. It is conceded that the bankrupt had an estate in fee-simple in this smaller tract, and that this tract is liable to the liens of his lien creditors.

Whatever interest George W. Anderson had in the larger, or eleven hundred acre, tract, is also liable to the liens of his lien creditors. Whether his interest was in fee-simple or for life is a question of law subject to the decision of this court in this proceeding. It could be adjudicated nowhere else in a manner to bind this court or the property itself. Sarah J. Anderson claims that the eleven hundred acre home tract came to her as her interest in her father's estate, and is her own property. She claims this by petition and by amended petition presented to this court in this bankruptcy proceeding. She claims that the liens of the lien creditors of George W. Anderson affect only the life-estate of George W. Anderson in this tract, and that they do not affect her own title in it. This is a question between herself and George W. Anderson's assignee in bankruptcy. She has come voluntarily into this court by next friend, and asks the court so to decree. She claims only a contingent dower interest in the tract of 335 acres, and submits her rights in that tract to the adjudication of this court in this proceeding.

In order to a full comprehension of the questions which have arisen in this case, I will recapitulate, with some fullness of detail, the facts that characterize it. Sarah J. Anderson, wife of the bankrupt, was one of six children left by Jacob Kent, who died intestate in 1858, leaving large real and personal estate. The other co-heirs had received greater or less portions of the estate during their father's lifetime. In the division and distribution of the estate, it was found that the home farm was nearly equivalent to the interest of one of the heirs and distributees. It was desired by the family that some one of the heirs should purchase this home farm. Mrs. Anderson was persuaded and agreed to do so, and accordingly on August 26, 1858, the day on

which the home farm and most of the personal property of the estate were advertised to be sold, it was announced in the presence of the company that the home farm would not be sold, and that Mrs. Anderson had consented to take it as her share of the estate.

Robert Gibbony, administrator of Jacob Kent, was authorized by the heirs to settle among them their shares of the estate, and to make sale of the land for division. His authority was in the form of a power of attorney, dated the nineteenth of July, 1858, signed by the heirs, and the husbands of those who were *femes covert*. But this power of attorney had, of course, no validity in law to bind these *femes covert*. *Shanks v. Lancaster*, 5 Grat. 110. By a paper similarly signed, it was agreed by the several heirs that each might take part of the estate of the intestate, Jacob Kent, at such appraisement as might be made by persons appointed by the county court of Montgomery county, which was the county in which the intestate died and his estate was. On the seventh of February, 1859, there was an arbitration and appraisement (made by three citizens chosen for the purpose) of the home farm, which then consisted of 1,200 acres, (100 acres have since been adjudicated by this court to belong to one Joseph Kent,) and the valuation of it was thereby fixed at \$13,248, which, as was recited in the paper signed by the arbitrators, was "to be paid for by Mrs. Anderson's entire interest in the estate." In short, the purchase of the farm was treated by all concerned as made by Mrs. Anderson; the consideration paid for it being her interest in her father's estate.

At some time during Gibbony's agency in selling the lands of the estate he sold to George W. Anderson, individually, a tract of 335 acres lying contiguous to the home farm, for the price of six dollars an acre. Gibbony went on to sell all the other of the numerous tracts of land belonging to the estate, none of which, except the home farm, was retained by any of the heirs. In the year 1862, (August 20th,) having made contracts for the sale of all the lands, and probably collected much of the purchase money, Gibbony caused deeds to be prepared, executed, and acknowledged, conveying, on the part of all the heirs, the several parcels of land (except the home farm) to the several purchasers of them. Mrs. Anderson, on the faith of having purchased the home farm with her own interest, joined in these deeds, granting fee-simple titles for all the other several parcels of the lands of the estate to the respective purchasers of them. She has not sought in this proceeding to set aside those deeds, but desires them to stand.

Notwithstanding the clear understanding which had been had at the beginning, and had continued for several years, between all persons in interest, and especially between Gibbony and Mrs. Anderson, that she had taken the home farm for her interest in the estate, yet Gibbony, in procuring the execution of the deeds conveying the several portions of the realty belonging to the estate as just mentioned, caused the remaining heirs, in conveying their interests in the home

farm, to make a deed for it to George W. Anderson instead of Mrs. Anderson, and to reserve in this deed, dated August 20, 1862, a vendor's lien (now claimed in favor of Gibbony's widow and representative) for about \$4,000, due from George W. Anderson, the bankrupt, personally, to the estate of Gibbony. On the twenty-first August, 1862, the day after this deed of the remaining heirs purports to have been executed, Gibbony, by a paper signed between himself and George W. Anderson, treated the home tract of 1,200 acres, and the tract of 335 acres purchased individually by Anderson, as both sold to Anderson himself, and took Anderson's bond for an aggregate sum made up of \$13,248, which had been awarded by arbitration as the price of the home farm, and \$2,010 or \$6 per acre for the 335 acre tract. Whether or not Anderson's connection with these proceedings of Gibbony was fraudulent or not in intention, does not appear. Mrs. Anderson does not charge fraud against him or the co-heirs. I think he acted in ignorance of the legal purport of what he was doing. The objects of Gibbony seemed to have been to secure the debt of about \$4,000, which he held against Anderson personally upon the home tract, as well as upon the other tract, and to make commissions as administrator upon the valuation price of the home farm (\$13,248) as well as upon his actual sales.

No considerable amount of money, if any, was ever paid by George W. Anderson on account of this \$13,248, and Gibbony, as to most, if not all of it, from time to time, as he settled his fiduciary accounts before commissioners, merely handed to Anderson receipts purporting that he had received from *Mrs. Anderson* amounts approximately making up the price of the home farm. Afterwards, when the transactions of August 21, 1862, came to be put in the form of G. W. Anderson's bond of that date, Gibbony credited these receipts, nominally from Mrs. Anderson, upon the bond.

Of these proceedings between Gibbony and her husband, Mrs. Anderson was all the while ignorant, and it would seem also that the deed from her co-heirs, conveying the home tract to Anderson instead of his wife, was never delivered to Anderson; that the execution of it to himself individually was unknown even to himself; that the co-heirs were not conscious of the effect of what they were doing, and that it was deposited for registration in the clerk's office of the county by Gibbony without the knowledge either of Anderson or his wife. The existence of the deed to her husband remained unknown to Mrs. Anderson or to her husband until some recent time, which is not shown in the evidence or the proceedings. For all that the proceedings show, she did not know of the transaction until December, 1872. In his schedule, B 1, George W. Anderson gave in his interest in the 1,200 acres of land which have been referred to, as a life-estate, reciting that this tract of land "was inherited by Sarah J. Anderson, wife of petitioner, from her father, Jacob Kent, and petitioner only has a life-estate in the same depending on his own life."

Notwithstanding the pendency of the proceeding in bankruptcy, the representatives of the estate of James R. Kent, who had recovered, in 1867, a judgment for a large amount against George W. Anderson, filed in August, 1869, a general creditors' bill in the circuit court of Montgomery county against G. W. Anderson and his two assignees in bankruptcy, for the purpose of subjecting his lands (treating the farm of Mrs. Anderson as his own in fee-simple) to their own judgment and those of all other lien creditors, including the vendor's lien for about \$4,000 held by Gibbony's representative; all the liens amounting to about \$19,000; the whole real property, including the home farm, being supposed to be worth upwards of \$20,000. As the assignees in bankruptcy of George W. Anderson could not legally become or be made parties to this suit, the suit was *ex parte* as to George W. Anderson's estate; all of which was in the custody and under the jurisdiction of the bankruptcy court. Nevertheless, the state court entertained the bill, and proceeded with the suit until it was ready for hearing. Mrs. Anderson filed a cross-bill setting up her rights, but lost heart, and on the twentieth December, 1872, was made to believe that the deed of August, 1862, made by her co-heirs to her husband, of the home farm, had bereft her of her right to the whole tract; and was persuaded to sign, which she did with great reluctance and distress, an agreement with the attorney of the lien creditors of her husband, John J. Wade, by which it was stipulated that a decree should be entered for a division, by survey, of the home farm into four parts, giving the choice to herself of one of these parts, to be held by a trustee for her in separate right, in fee-simple, and for permitting the sale of the other parts for the benefit of her husband's lien creditors. As to parties, this agreement recited that it was made between George W. Anderson and Sarah Anderson, his wife, of the one part, and 12 creditors of George W. Anderson, to-wit: Floyd Smith; E. D. Slingluff & Son; D. Preston Parr; Hartman & Strauss; Mrs. Ellen Gardner; Isaiah A. Welsh, administrator of James R. Kent, deceased; McDowell, Robinson & Co.; Adams & Co.; T. J. Henderson & Co.; Keen, Baldwin & Williams; John R. Francis, administrator of A. W. Forest, deceased; and Mrs. E. Gibbony, administratrix of Robert Gibbony, deceased, acting through their agent and attorney at law, John J. Wade,—parties of the other part. The paper was signed and sealed by George W. Anderson, Sarah J. Anderson, "and John J. Wade, agent and attorney for the creditors of G. W. Anderson mentioned in this agreement." It was not signed by the assignees in bankruptcy of George W. Anderson.

All of George W. Anderson's interest in or control of the home tract of land having passed to his assignees in bankruptcy, his signing this agreement was nugatory. Mrs. Anderson's execution of the writing was privily acknowledged on the day of its date, namely, the twentieth December, 1872, before one of the counsel of the creditors, Thomas E. Sullivan, who was designated in the body of the writing

as the trustee who was to be intrusted with her title to the portion of her home farm which was to be set off to her. Her acknowledgment was made under circumstances of haste and pressure, and a consent decree, in accordance with the agreement, was hastily entered by A. MAHOOD, judge of the Montgomery court, on the day of its date, directing it to be carried into execution. The assignee of George W. Anderson (or rather the surviving assignee of two, one of whom is dead) did not sign the agreement of twentieth December, 1872, at the time, but he afterwards, to-wit, on the twenty-seventh November, 1875, indorsed on the copy of it his acceptance and adoption of it. He was then incapacitated from signing it by the prior injunctive orders of this court.

After this decree was entered and the survey for a division made, Mrs. Anderson joined her husband in a deed conveying the parts of the home tract, not retained by her, for the benefit of creditors, in pursuance of the agreement and decree just mentioned. This deed was acknowledged by her before the assignee of George W. Anderson, in bankruptcy, a party in interest, but was never duly delivered, was recalled before delivery, and that part of the decree has never been executed by herself and her husband. So far as her own action goes, therefore, there is no further committal of herself to the alienation of her home tract than the agreement she signed with the attorney of the creditors, and the decree of the state court made upon it, both on December 20, 1872. This paper of that date is void as to Mrs. Anderson. A married woman can validly execute no instrument except such as is authorized by section 4 of chapter 117 of the Virginia Code of 1873, page 906, which provides that "when a husband and his wife have signed a writing purporting to *convey or transfer* any estate, real or personal, she may appear before, etc., * * * and make acknowledgment of the same." No act of a married woman, unless the instrument signed presently *conveys or transfers* the estate, can be held to divest her of her rights in it. This power given by statute to a married woman does not apply to executory contracts, or to any other acts except deeds or writings making present transfer or conveyance of estate. 2 Minor, Inst. 582; *Shanks v. Lancaster*, 5 Grat. 110.

The writing signed by Mrs. Anderson on the twentieth of December, 1872, was wholly executory. It was a mere agreement that something should be done in the future. It is void on its face as to Mrs. Anderson, because it was executory and of the character of a mere power of attorney. It was void for two other reasons. The agreement stipulated that Thomas E. Sullivan, who was counsel for the lien creditors, should be the trustee to whom should be conveyed for her separate use that portion of the lands stipulated to be divided, which should be allotted to herself. Yet the record shows that her acknowledgment of this executory agreement was made before this very Thomas E. Sullivan, privily and apart from her husband. This

acknowledgment was void because it was made before an interested person. A fundamental maxim of jurisprudence is that no man can be a judge in his own case. Broom, 117. A grantee in a deed, or a beneficiary under it, is not allowed, as an officer, to take an acknowledgment of the deed by the grantor with a view to its registration. *Davis v. Beazley*, 75 Va. 495.

The agreement was also void because never recorded. The acts of married women, unlike those of persons *sui juris*, are void even as to themselves, unless authorized by express statute. It is the statute law alone which gives them validity, even as to themselves. The statute of Virginia requires that conveyances by married women shall not only be acknowledged before a designated officer, but recorded also. See section 7, c. 117, Code Va. 1873, p. 907. It is not pretended that Mrs. Anderson's agreement of December, 1872, and her acknowledgment of it, was ever recorded. Her acknowledgment before an interested officer was nugatory, and the failure to record it completely vitiated the paper. On its face it is absolutely null and void, because executory, because illegally acknowledged, and because never recorded.

Although the agreement was incurably null and void, and although the creditors' suit in the state court was inherently nugatory as to all the estate in the custody and control of the bankruptcy court, counsel for lien creditors contend that by her cross-bill filed in the suit in the state court, Mrs. Anderson submitted her rights to that court, and is bound by its decree directing the execution of the agreement of December, 1872. But that court had no jurisdiction to deal with titles and rights in property not only not within its custody, but in the custody of the bankruptcy court. The agreement, if it had any effect, passed three-fourths of the home farm to the assignees in bankruptcy of George W. Anderson, and subjected those three portions to the exclusive jurisdiction of the bankruptcy court. Mrs. Anderson could not by cross-bill confer jurisdiction upon the state court over that property. Neither express nor implied consent can give jurisdiction. As to the bankrupt's estate surrendered in bankruptcy, neither the assignees nor lien creditors, by consent, nor Mrs. Anderson, by cross-bill or agreement to assign a disputed three-fourths of the home farm to the use of lien creditors, could divest the bankruptcy court of its exclusive jurisdiction of the property surrendered and transfer it to another court. If Mrs. Anderson's agreement could be executed at all, there was no court competent to do so but the bankruptcy court. The creditors' bill in the state court was *coram non judice*; the estate of the bankrupt, including all property in which he claimed any interest, had passed to his assignees, and was in the custody of the bankruptcy court; and the cross-bill of Mrs. Anderson was as empty of jurisdiction for the state court to execute an agreement inherently and incurably void on its face, as so much brown paper.

George W. Anderson was *civiliter mortuus* as to his estate surrendered in bankruptcy, except, perchance, as to a homestead exemption. Claiming this, and in an effort to escape the action of the Montgomery court, he filed a petition in the bankruptcy court at Richmond, on the twenty-ninth July, 1873, praying an injunction against I. A. Welsh, administrator *d. b. n.* of James R. Kent, complainant in the suit in that court, and his other lien creditors, parties thereto, from all further proceedings therein; which was granted by the then judge of the court, Judge UNDERWOOD. The object of this petition was to have a homestead to the value of \$2,000 set apart to the bankrupt out of the real estate he had surrendered in bankruptcy. This claim being inadmissible, that petition was afterwards dismissed, and the order of injunction granted upon it might have been dissolved, but for the fact that in December, 1873, Mrs. Anderson had come into the bankruptcy court at Richmond, by petition setting out the leading facts which have been recited, and praying the court to protect her rights, and either to set aside and annul the deed of her co-heirs to George W. Anderson, of twentieth, August, 1862, and require these co-heirs to convey the home tract to George W. Anderson only for his life, and, after his death, to herself and her heirs, or else to appoint a commissioner of the court to make the proper deed. That petition brought to the knowledge of the bankruptcy court, for the first time, the proceedings that had taken place in the circuit court of Montgomery county; the so-called agreement, which Mrs. Anderson had signed under the coercion of those proceedings, with the attorney of her husband's lien creditors; and the decree of the Montgomery court based upon that agreement.

The bankruptcy court decided, upon the petition, that the proceeding against George W. Anderson, a bankrupt and *civiliter mortuus* as to his estate, was *ex parte*, and as to the estate in bankruptcy and the assignees of the estate was *coram non judice* and null; the estate being in the custody and within the exclusive jurisdiction of the bankruptcy court, and the assignees having no power to make themselves parties to a proceeding in the nature of a creditor's bill against the bankrupt, his estate, and his assignees, commenced after the adjudication in bankruptcy. See *Case of George W. Anderson*, 9 N. B. R. 360, and 3 Hughes, 379-385. Its decree to this effect was made on the sixteenth March, 1874, and was affirmed, on appeal, November 30, 1874. That question is therefore *res judicata* as between all parties to this proceeding. That decree also enjoined all further proceedings in the circuit court of Montgomery by the assignees, and by the parties plaintiff there, and no further steps have been taken in that court.

The case came again to a hearing in the district court at Richmond, as a court of bankruptcy, on the petition of Mrs. Anderson, by her next friend, which has been mentioned, on a plea of the statute of limitations interposed by the assignee to Mrs. Anderson's petition, and

on the petition and answer of Isaiah A. Welsh, administrator *d. b. n.* of James R. Kent, the creditor who filed the general creditors' bill in the circuit court of Montgomery county, which has also been mentioned. This petition of Welsh, administrator, filed December 7, 1875, prayed for a specific execution of the agreement signed by Mrs. Anderson on the twentieth December, 1872. As to the rest, it was an answer to Mrs. Anderson's petition.

At the hearing of these matters the bankruptcy court at Richmond, by decree of April 13, 1876, overruled the assignee's plea of the statute of limitations, on the ground that the exclusive jurisdiction of the bankruptcy court to pass upon all specific claims upon the bankrupt's estate, and to settle all conflicting interests between the various parties to a bankruptcy proceeding, is not affected by the provisions of the bankruptcy act limiting within two years suits brought by or against assignees in bankruptcy against or by persons in adverse interest; and that even if it were, Mrs. Anderson's petition was brought before the expiration of two years after she came to a knowledge of the fraud or mistake of which she complained.

The two-years limitation provided in section 4979 applies to the "suits at law and in equity" authorized by that section. It relates to suits brought independently of and separate from the bankruptcy proceeding, as such, to suits brought in the circuit or district courts, or in state courts on their common-law or equity side. It does not interfere with or limit the jurisdiction of the district courts on their bankruptcy side in bankruptcy proceedings to "ascertain and liquidate liens and specific claims, and to adjust the various priorities and conflicting interests of all parties" to the bankruptcy proceeding proper.

This petition of Mrs. Anderson is not a suit on the equity side of the district court, but is a collateral petition filed in, as part of, the bankruptcy proceeding. As such, it came here by removal from the Eastern district. If it were a distinct and several suit, it would not be here at all, but would still be pending at Richmond; for the order of removal made at Richmond embraced nothing but the bankruptcy proceeding. It was *verbatim* as follows:

"IN THE DISTRICT COURT OF UNITED STATES, EASTERN DISTRICT OF VIRGINIA, IN BANKRUPTCY.

"In the matter of George W. Anderson, bankrupt.

"Upon the motion of Floyd Smith and Elizabeth Gibbony, administratrix of Robert Gibbony, deceased, judgment creditors of said bankrupt, it is ordered by the court that this cause be removed to the district court of the United States for the Western district of Virginia, held at Lynchburg, in said district. And it is further ordered that the clerk of this court transfer the papers herein to the clerk of said district court at Lynchburg.

"Richmond, sixteenth June, 1881."

It was because Mrs. Anderson's petition was part of the bankruptcy suit, and not a suit distinct from it, that it came here under that order.

In its decree of the thirteenth April, 1876, the bankruptcy court ruled that the home farm having been paid for by Mrs. Anderson's property, the deed from the other devisees ought to have been made to her and not to her husband; and that the court, considering that to have been done which ought to have been done, and a resulting trust to have arisen to Mrs. Anderson, would direct a conveyance of the home farm to her by a commissioner, subject to the life-estate of her husband, which latter, together with the 335 acre tract, would be sold for the benefit of her husband's lien creditors. But this court declined at that time to order the sale, and gave leave to Mrs. Anderson, by amended petition, to make all the lien creditors, in behalf of whom the attorney, Mr. Wade, had signed the agreement of December 20, 1872, with Mrs. Anderson, parties defendant by name to her petition. The court in that decree dismissed the petition of J. R. Kent's administrator, in which he had set up the agreement of the twentieth December, 1872, in bar of Mrs. Anderson's claim, and pronounced finally against the administrator and the assignees. Previously to the decree there was a formal joinder of issues made up between counsel, dated December 10, 1875, in which it was stipulated in writing between Robert Stiles, counsel for Mrs. Anderson, on one side, and J. J. Wade, "attorney for assignee and lien creditors," on the other, among other things, that "the petition and answer of Isaiah A. Welsh, administrator of J. R. Kent, deceased, * * * shall be filed *nunc pro tunc* as an answer and cross-petition to Mrs. S. J. Anderson's petition; * * * that the bankrupt and assignee, so far as they are necessary or proper parties, be considered as having waived service of process upon both said cross-petitions, and as consenting to the hearing of both; and finally that the evidence taken under the order of April 21, 1875, and all papers since filed or entered in the cause by consent, are to be considered as taken and filed under the issues as thus joined and made up." The stipulation also submitted the assignee's plea of the statute of limitations.

The order concerning evidence referred to had been entered eight months before the hearing. It was drawn up and applied for by Mr. Wade, "attorney at law for Kent's estate and other creditors of George W. Anderson," and gave Mrs. Anderson two months within which to take depositions in support of her claim, then gave the petitioning creditors one month for depositions in rejoinder, and afterwards Mrs. Anderson a month for her testimony in conclusion; the depositions to be taken on notice of 10 days. The depositions were exceedingly voluminous, making probably 500 pages. Notice of the taking of Mrs. Anderson's testimony was accepted by the assignees in bankruptcy, and in every instance by counsel signing "for the judgment creditors and Robert Gibbons's administratrix." The evidence was taken upon as full notice, and in as orderly and formal a manner, as any that was ever taken in the most plenary suit ever conducted in a court of justice. It was not only taken by parties on both sides

of the issues to be tried, and on full notice, but was taken in accordance with the previous order of court before mentioned, as drawn by the counsel for Kent's administrator, the other creditors of the bankrupt, and the assignees.

There can be no objection to these depositions, on the part of any creditors, for want of notice, or of presence, or opportunity to be present, at their taking. None has been made. No exceptions have been taken to them, save on the ground of the incompetency of Mrs. Anderson to testify for or against her husband, and of any of the witnesses to testify in their own interest as against Robert Gibbony, who is dead. But this suit is between Mrs. Anderson and her husband's assignees, not himself. Her husband has no interest in the property in litigation; all his interest having passed to the assignees. She is competent as to him. As to Robert Gibbony, neither he nor his estate has any direct interest in the property surrendered in bankruptcy. The assignees are the parties defendant, and represent many creditors, most of whom are living, and only a few dead. Mr. and Mrs. Anderson are competent witnesses as to the assignees, and all whom they represent, living or dead, on the general principles of evidence. But, whether so or not, they are competent witnesses by the express provisions of the bankruptcy act. Section 5088 expressly makes the wife of the bankrupt so, and the amending bankruptcy act of June 22, 1874, § 8, provides generally that any party to a "trial or cause" arising under the bankruptcy act shall be a competent witness.

No valid appeal has ever been taken from the decree of April 13, 1876, which was entered upon consideration of these voluminous depositions. As against Kent's administrator, the assignees in bankruptcy, and George W. Anderson, that decree stands as *res judicata*. The time for renewing it by appeal has long since expired, and the question of the right of Mrs. Anderson to the home farm, subject only to the life-estate of her husband, is forever concluded as against James R. Kent's estate and the assignees of George W. Anderson, representing all creditors. It is true that from the decree just mentioned Kent's administrator appealed to the circuit court. The matter was argued before Chief Justice WAITE, who, on the twentieth of May, 1876, entered a decree dismissing the appeal for want of jurisdiction, holding that the matter was one not for "revision," but for regular "appeal." The regular appeal, however, was never taken, and cannot now be taken, and the decree of April 13, 1876, is, as said before, final as against the assignees and Kent's administrator. More than that, it is now too late for a review of its own decree by the district court itself; for wherever appeal can be taken a petition for rehearing must be brought before the end of the term in which the decree has been rendered. Judges in bankruptcy will not hear petitions for review brought in disregard of this rule.

As before stated, the decree of April 13, 1876, after passing upon

the rights of Mrs. Anderson as against the assignees in bankruptcy and the lien creditors of the bankrupt, went on to give her leave to amend her petition by making all the lien creditors of the bankrupt, in whose behalf John J. Wade had signed the agreement of December, 1872, parties defendant to it. This turns out to have been unnecessary. The practice in such collateral proceedings, incident to bankruptcy proceedings, as that of Mrs. Anderson, had not then been settled by express adjudications of the supreme court of the United States; and therefore, notwithstanding the fullness of proofs, and completeness of opportunity which had been enjoyed by the assignees in bankruptcy representing all creditors, and by lien creditors, all represented by counsel of record, I thought it best to allow an amended petition to be filed by Mrs. Anderson, making formal parties defendant, by name, of the lien creditors who were interested in the agreement of the twentieth of December, 1872, which had been signed by Mrs. Anderson. If I had known then of the decision of the supreme court of the United States in *Stickney v. Wilt*, 23 Wall. 150, which had shortly before been rendered, and which appeared in the last and very tardily published volume of Mr. WALLACE, I should have entered a final decree at that time, not only against the assignees in bankruptcy and J. R. Kent's administrator, (against whom I did decree finally,) but against all the lien creditors of the bankrupt; for they were all parties to the proceeding in bankruptcy by force of regular publications, and bound by its adjudications whether expressly named in decrees or not.

It seems to be made necessary by the numerous motions and petitions which have been brought by counsel in this cause at various stages, in behalf of lien creditors, that I should enter to some extent into a dissertation upon the nature of a bankruptcy proceeding, as illustrated by the one at bar. The controversy between Mrs. Anderson and the lien creditors of the bankrupt, her husband, forms a necessary part of the bankruptcy proceeding. By virtue of George W. Anderson's having an estate in the home farm of her father, the fee of which she claims, this court and its predecessor in the Eastern district have had in this proceeding jurisdiction to settle the title to the home farm, as to this "specific claim" upon it. Whatever title the bankrupt had, passed to his assignees in bankruptcy at the time of his adjudication. The question whether the bankrupt had a title in fee or an estate for life only, was a question between Mrs. Anderson and the assignees. The creditors of the bankrupt were and are beneficiaries of whatever title has vested in the assignees, and are all represented in the litigation of the question by the assignees. The litigation as to the home farm is essentially between Mrs. Anderson and the assignees, and this court has jurisdiction of that litigation. It not only has jurisdiction, but that jurisdiction is exclusive. Section 4972 of the Revised Statutes of the United States declares that the jurisdiction of the district court shall extend, among other things,

to the collection of all the assets of the bankrupt; to the *ascertainment* and liquidation of the liens and other *specific claims* thereon; to the adjustment of the various priorities and *conflicting interests* of all parties; and to the marshaling and disposition of the different funds and assets, so as to *secure the rights of all parties*, and due distribution of the assets among all *creditors*. It is difficult to conceive how the jurisdiction of the court could be made more ample than it is made by this section, which gives jurisdiction not only as to all *creditors* of the bankrupt, but as to all *parties* to proceedings collateral to the bankruptcy proceeding. It does not allow persons having specific claims upon the estate of the bankrupt to sign agreements with creditors to be specifically executed under decrees of other courts, but makes the bankruptcy court the arbiter of those claims. It authorizes the bankruptcy court to ascertain and secure the rights of all parties setting up "specific claims" upon the bankrupt's estate, and does not leave these parties, if married women, to wander into other courts for the obtainment of these rights. Its jurisdiction is as beneficent as ample, and it is difficult to see how the court could do complete justice between the numerous, often the multitudinous, parties to bankruptcy proceedings unless its jurisdiction was thus ample.

This jurisdiction is not only as comprehensive as just shown, but, I repeat, it is exclusive. Before June 20, 1874, it was not exclusive. The state courts, before that date, might have concurrent jurisdiction, in sundry instances, over debts and property of the bankrupt. So, also, might the circuit courts of the United States have concurrent jurisdiction under section 4979, cited at bar by counsel for lien creditors. But the act of that date, known as the Revised Statutes of the United States, in section 711, makes the jurisdiction of the district court in bankruptcy, as set out in section 4972, exclusive. It was made exclusive then, for the first time in the history of our federal jurisprudence. In *Clafin v. Houseman*, 93 U. S. 130-133, the supreme court of the United States say that the Revised Statutes, [of 1874,] "whether inadvertently or not," have made the jurisdiction of the United States courts exclusive "in all matters and proceedings in bankruptcy." In that case the court express a doubt whether the clause of section 4979 authorizing suits at law or in equity to be brought by or against assignees in bankruptcy, even in United States circuit courts, is not repealed by the provision of section 711 of the Revised Statutes of 1874, giving exclusive jurisdiction in bankruptcy matters to the district courts. Certainly is the concurrent jurisdiction of state courts taken away absolutely. This exclusiveness of jurisdiction was necessary. The proceeding in bankruptcy is, in character, effect, and object, the same as a general creditors' bill in chancery. It supplies the place and purpose of such a bill. It supersedes and dispenses with it. The two could not go along together, for it is an old principle that two courts cannot entertain several creditors' bills against the same debtor at the same time.

If, pending a bankruptcy proceeding, a creditors' bill for settling the affairs of the same bankrupt is brought in a state court or any other court, that bill is *coram non judice*; and the bill itself and all proceedings under it are null and void. It is unnecessary for the bankruptcy court, which has exclusive jurisdiction of the subject-matter of the bankrupt, his assignee and creditors, to declare them so. They are, inherently, essentially and absolutely so already. There is but one possible qualification to the general doctrine; which is that where, before the bankruptcy, another court has acquired full cognizance of any suit against the debtor *concerning specific property*, or even of a creditors' suit, it may go on and administer *whatever property* may have come into its custody or control, according to its own rules of decision; but its power to do this exists only in cases commenced before the debtor's bankruptcy. *Eyster v. Gaff*, 91 U. S. 521. It has no power to entertain the suit of a creditor after bankruptcy for cause of action arising before. The jurisdiction of the district courts is not only exclusive as to suits brought elsewhere *after* the bankruptcy, but is even so, in some instances, as to such suits brought and ended *before* the bankruptcy.

In *Humes v. Scruggs*, 94 U. S. 22, an assignee brought suit in the United States district court to set aside a deed of settlement, which had been made by a husband in favor of his wife, alleged to have been executed in fraud of his creditors. As a defense in bar to this suit the wife set up a decree which had been rendered in a suit brought by her next friend in a state court, before her husband's bankruptcy, against her husband, in which the deed had in all things been ratified and confirmed by the state court. The United States district court refused to go behind the decree of the state court, but the supreme court of the United States held, on appeal, that the adjudication in the state court did not bind the United States district court having jurisdiction of the bankrupt's estate. The point of the case, so far as it relates to the one at bar, is that the jurisdiction of the district courts of the United States over all the property belonging in law or equity to the bankrupt cannot be defeated by proceedings in other courts, no matter whether brought before or after the adjudication in bankruptcy. Therefore it is that there is nothing in the much-pressed point that Mrs. Anderson had, by her cross-bill in the creditors' suit in the Montgomery court, submitted her claims in the home tract to that court. The cross-bill was but a branch of a suit *coram non judice*, the nullity of which was fatal to the collateral proceeding. It was the more so because the decree against her in that suit was rendered upon an agreement null and void, as to herself, on its face. This court had to look into the record of the Montgomery court. It was invited to do so by the lien creditors. Thus invited, it did look into that record, and saw patently and prominently that the decree there was in execution of a writing incurably void and null. The case was precisely the same as that of *Humes v. Scruggs*, just com-

mented on, except that _____ of the married woman there attacking the instrument on which the decree of the state court was founded, it was the assignee who did so. In that case the district court was held bound to pass upon the validity of the instrument and of the decree. So it is bound here. If the jurisdiction of the district court was good there to set aside the instrument and disregard the decree, so it is here.

The creditors' bill, which was brought against George W. Anderson and his assignees in the circuit court of Montgomery county, after the commencement of this bankruptcy proceeding, was *coram non judice*; it was not only so pronounced to be by myself, when the petition of Mrs. Anderson and that of J. R. Kent's administrator were first before me at Richmond, in March, 1874, but, on appeal, was declared by the circuit court to be null and void. In his opinion in affirmance the circuit judge said:

"It is clear that both Mrs. Anderson and her husband were entitled to be heard in the district court, and that the proceedings in the state court, commenced after adjudication in bankruptcy, were null and void, so far as they affected the rights of any person who might come into the bankruptcy court, claiming an interest in the property in litigation in the state court."

And the circuit court remanded the cause to the district court "with directions to proceed to ascertain the rights of the parties claiming the property in litigation in the state court." All this is *res judicata* as to Mrs. Anderson, the bankrupt, his assignees, and the administrator of James R. Kent. I may go further and say that all the creditors of this bankrupt, and especially those represented by Mr. John J. Wade, as counsel, who took the appeal I have mentioned, are estopped by the decree of affirmance from insisting upon the validity of the creditors' suit in the Montgomery court, or any part of it, and are estopped from denying the exclusive jurisdiction of this court, in this bankruptcy proceeding, to proceed to ascertain the rights of the parties claiming the property which was sought to be subjected to division and sale in the state court.

It is objected that the petition and amended petition of Mrs. Anderson in this cause, being plenary, and not summary, should have been treated as a bill in equity, and that proceedings in it should have been according to the course of practice in plenary bills in equity. Objection is also made to the bankruptcy proceeding on the allegation that it is summary and not plenary, and therefore not a proceeding in which the trial of the rights of Mrs. Anderson as against the assignees in bankruptcy of this bankrupt, representing his creditors, should be had. On the contrary, a bankruptcy proceeding is more plenary than almost any other known to English or American jurisprudence. It is more so than the ordinary creditors' suit in chancery. As already said, it is itself a creditors' suit in its nature and objects. The difference is only in the practice; most of that in the bankruptcy proceeding being prescribed by statute. Many of the

matters connected with the proceeding. Indeed, as in creditors' suits in chancery, heard on rules *nisi* and motions to show cause, which are summary; but this is because the parties to those motions are already before the court in the bankruptcy proceeding, and it is useless to get out process to bring them in, and to resort to plenary methods in determining them. But petitions collateral to the bankruptcy proceedings, which in their nature are plenary, do not become summary merely from the fact that they are brought in the bankruptcy court. They are in form and character like collateral petitions brought in creditors' or other suits in chancery. In the case at bar, the bankruptcy proceeding was itself plenary, and the collateral petition filed in it by Mrs. Anderson was plenary. All the parties in adverse interest to Mrs. Anderson—that is to say, the assignees, and the lien creditors represented by them—being already in court as parties to the bankruptcy proceeding, it was unnecessary for petitioner to make them formally, by name, parties defendants, and to pray for process to bring them into court. They were already in court as parties defendant to her petition soon after it was filed, by force of the regular publications in bankruptcy.

It is contended that Mrs. Anderson had no right to file her petition in the bankruptcy proceeding as a collateral part of it, but ought to have brought a separate plenary suit either in the United States district or circuit court. Section 4979, adduced as authorizing such a suit, and the cases of *Smith v. Mason* and *Marshall v. Knox*, are cited as requiring that course to have been adopted. But section 4979 merely gives the option to an assignee to bring such a suit against a stranger to the bankruptcy proceeding, and gives a stranger such a right as against an assignee. It allows an option, but does not impose a duty. It does not require the assignee to go out of the district court or the bankruptcy proceeding to assert a claim, nor does it shut the door of the district court in the bankruptcy against a stranger. Efforts have been made to induce the supreme court of the United States to require, by judicial legislation, a resort to such suits, where persons not necessary parties to the bankruptcy proceeding have adverse rights to the assignee and creditors in the bankrupt's estate, but that court has refused thus to supplement the statute law by making that necessary which the statute leaves optional. There are cases, indeed, in which approved canons of procedure require that rights of property should be determined by methods pursued in suits other than bankruptcy proceedings,—that is to say, in ordinary common-law and chancery proceedings,—and the supreme court has held that in such cases resort should be had to suits at law or in equity.

In the case of *Smith v. Mason*, 14 Wall. 419, it held that where property belonging to the bankrupt's estate has, before the bankruptcy, been transferred to a "third party," who is not a party to the bankruptcy proceeding, and that person is in possession of the property, and the assignee seeks to recover the possession from him, the suit

must be brought at law or in equity, and that the property cannot be recovered from the "third party" by rule to show cause brought in the bankruptcy proceeding. But in summing up the case, at the conclusion of the decision, the supreme court said: "Strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such a litigation, cannot be compelled to come into court under a petition for a rule to show cause." This language, therefore, limits and qualifies the rather broad terms which had been used by the court on pages 430, 431, implying that such persons as "cannot be compelled to come into court by rule to show cause" may not come in voluntarily, as Mrs. Anderson did.

In *Marshall v. Knox*, 16 Wall. 551, the same court ruled in the same manner. There, a partnership firm were lessees of a plantation in Louisiana. One of the partners went into bankruptcy. The lessor, after this event, distrained for rent upon mules and other property found on the premises belonging to the firm; the sheriff acting as the distraining officer. The assignee of the bankrupt partner thereupon sued out of the bankruptcy court a rule upon the lessor and the sheriff, requiring them to show cause before the bankruptcy court why they should not deliver to the assignee the distrained property. The supreme court of the United States held, on appeal, that the rights of the lessor, a third party in possession, who was a stranger to the bankruptcy proceeding, could not be adjudicated against his consent under summary rule to show cause sued out against him in the bankruptcy proceeding.

The case at bar is essentially different from both of those just mentioned. The property with which we are concerned is in the constructive possession of the assignee, and in the actual possession of the bankrupt, who holds for the assignee. It is thereby in the custody of this court, and is part of the assets in bankruptcy over which section 4972 gives it complete and exclusive jurisdiction. It is not in the possession of a "third party," having color of title, whether as vendee, creditor, or sheriff, and the petition of Mrs. Anderson is not a summary rule against a "third party" to show cause why he should not be dispossessed of the property. Moreover, the supreme court held in both cases last cited that the "third party" in each case could not be brought, by mere rule to show cause, into the bankruptcy proceeding to try rights of property against his will. It did not decide, and has never decided, and I am sure will never decide, that a third party may not come voluntarily into a bankruptcy proceeding, by petition or other plenary method, and submit to the bankruptcy court his rights touching property in the custody of that court, claimed as assets by the assignee in bankruptcy. Mrs. Anderson has come voluntarily into this court in this proceeding and asked the adjudication of her "specific claim" for property in the custody of the court upon which liens are claimed by creditors, who are already

in that court as parties to the bankruptcy proceeding, seeking to subject that property to their liens by decree of the bankruptcy court.

A petition, filed collaterally in a bankruptcy proceeding or other creditors' suit, calling for an answer, which answer is filed, and depositions taken on these pleadings through the course of many months, and then heard on an agreed "making up of issues," is a plenary proceeding, and binds all parties concerned. The petition of Mrs. Anderson, thus proceeded in, bound the assignees and all the creditors of the bankrupt. Even in creditors' bills, every creditor need not be made formally and by name a party to the record. A few creditors may maintain a suit in behalf of themselves and all other creditors standing in like relations to the debtor and his estate. The other creditors may come in and prove their debts, and may be treated as parties to the suit. If any of them decline to do so, they will be excluded from the benefit of the distribution of assets, and will nevertheless be bound by the decrees of the court. Story, Eq. Pl. § 99. Where the creditors are represented in the suit by a trustee or an assignee, the circuit courts of the United States refuse to hear motions or to receive petitions from individual creditors, require the trustee or assignee to represent them in all respects, and hold them bound by all orders and decrees to which the trustee or assignee is a party. As to trustees, this is a settled practice.

So it is in bankruptcy proceedings. The publication in bankruptcy brings all creditors into court. As early in the history of the practice, under the bankrupt act of 1867, as the year 1868, Judge TREAT held, in *Davis v. Anderson*, 6 N. B. R. 145, that "creditors of a bankrupt, having security, whether by judgment, mortgage, or otherwise, must prove their debts against the bankrupt, and foreclose their liens under the authority of the court in bankruptcy, or they may not only be barred of their debts, but may also lose the benefit of their securities. They are parties for the purpose of administering the estate, whether they formally come in or not. If they fail to prove their debts, and receive no dividends in consequence, they are barred." This ruling of a judge of very high authority has been followed ever since, and is only qualified by the exception of those cases in which specific liens are held on specific property, and the amount of the lien exceeds or equals the value of the property which it covers; in which cases nothing passes to the assignee.

Every judgment creditor of George W. Anderson was a party to the bankruptcy proceeding, *nolens volens*, whether he came in and proved his debt or not. The judgment creditors were so because their liens were general. The only creditor who was not as of course a party, was the representative of Robert Gibbon's estate, in favor of whom there was a specific lien on specific property. But this lien was for a sum inferior to the value of the property it bound. Such was the condition of that lien as to that property that the representative of that estate could not have enforced it without coming into the bank-

ruptcy court. As to Mrs. Anderson's petition, Mrs. Gibbony came in by counsel, and was represented in the depositions, and in the making up of issues, and in the decree of April 13, 1876. The lien creditors being parties to the bankruptcy proceeding in which Mrs. Anderson filed her petition, it was immaterial whether they were formally named as defendants in the petition or not. It was only necessary for her to state her specific claim and ask the protection of it by the court. By the filing of her petition, those against whose liens she claimed, being all creditors in court, became parties defendant to it. The agreement of December 20, 1872, even if it had been valid, could not put them out of court, if Mrs. Anderson chose to come in. When she came in it was unnecessary for her to make them parties by prayer for process. In *Stickney v. Wilt*, 23 Wall. 150, it was pointedly held by the supreme court that the fact that the petition did not pray for process, did not affect the sufficiency of the petition even against strangers to the proceeding; the court saying: "Beyond all doubt the petition contains every requisite of a good bill in equity, whether the pleading is tested by the statement of the cause of action, or by the charging part of the bill, or by the prayer for relief." Nor is it any objection to the validity of Mrs. Anderson's proceeding that her first pleading is in the form of a petition.

In *Stickney v. Wilt*, instead of bringing a distinct bill in equity in the United States district or circuit court, the assignee filed his petition in the bankruptcy proceeding, assailing the validity of certain mortgage deeds resting upon lands of the bankrupt held by persons who were in no way parties to the bankruptcy proceeding. They were not judgment creditors, but creditors having specific liens upon specific pieces of realty, one of them a vendor's lien and all the rest specific mortgages. They had not proved their claims, but stood out upon their specific securities. The assignee filed a petition assailing their liens and setting out his case, without praying or taking out process against them. They made voluntary appearance and defense; and, on appeal, sought to set aside all that had been done under the petition on the ground that the assignee should have brought a distinct suit in equity against them by formal bill. The supreme court held that the petition was a suit, and that the bankruptcy court had jurisdiction without process against lienholders, when they come in voluntarily. The mortgagees in that case were in the same relations to the petition filed that Gibbony's estate is in here. The only difference is that Mrs. Anderson files the petition instead of the assignee. The case of *Stickney v. Wilt* settles affirmatively the question whether contests respecting the property of the bankrupt between an assignee and persons having specific claims adversely can be litigated in the bankruptcy proceeding in cases where strangers to that proceeding come voluntarily into it, as was done by Mrs. Anderson on one side and Gibbony's representative on the other. The cases of *Smith v. Mason* and *Marshall v. Knox*, *supra*, so far from negativ-

ing the proposition, really affirm it. In both the latter cases the assignee sought to bring strangers to the bankruptcy proceeding into court against their will by the summary process of motions to show cause, and the supreme court held that this could not be done; ruling, in effect, that if an assignee seeks to litigate against strangers any right of property, especially where the property is not in the custody of the court, he must sue them as any other person must sue them, either at law or in equity, in a proper court other than the bankruptcy court sitting in bankruptcy.

I have thus shown that it is not a valid objection to the proceeding of Mrs. Anderson that it was a petition filed in the bankruptcy proceeding as part of it, instead of a distinct suit brought in the district court on its equity side; or that this petition did not make parties defendant by name, and pray for process against the lien creditors of the bankrupt who were already, by the publications in bankruptcy, parties to the proceeding; or that these creditors and the assignee were not summoned each personally to appear and make answer to the petition, filed in a proceeding where they had already been summoned by publication and were constructively present; or that they had not formally appeared and made especial answer to the petition. The assignee was in court and pleaded the statute of limitations. Isaiah Welsh, administrator of J. R. Kent, much the largest creditor, appeared formally, and answered and filed a cross-petition, making all the defense that could be made, either by himself or other creditors, not only by negation of Mrs. Anderson's claim, but by affirmation of those of the lien creditors. All the other lien creditors, though not formally answering the petition of Mrs. Anderson, were in point of fact represented by counsel in the taking of depositions for eight months, and in the argument at the hearing. They were represented by the same counsel who had represented them in the state court, who had signed for them the agreement of December, 1872, and who now represented Welsh and the assignee. They were represented by that counsel in the "making up of issues" antecedent to the hearing preparatory to the decree of April 13, 1876. That hearing was on the eleventh of December, 1875. The argument was elaborate and full, oral and in writing, and made in behalf of all the lien creditors. After the hearing, the court held the case under advisement for four months. Thorough investigation was made of all the voluminous evidence; all proceedings in Montgomery court; and all the proceedings in bankruptcy. During that interval the court freely accepted additional notes and suggestions from counsel on the points involved. While the case was *sub judice*, I received a letter from Mr. Wade, dated on the twenty-seventh of January, which is filed in the cause, in which he said: "I have already said all I wish to say in the case, and, besides my oral argument, I left with Major Stiles a hastily written note of argument on the evening the case was submitted to your honor." This note I had. Seldom was a cause

more thoroughly contested, more fully and earnestly argued, or more deliberately and maturely considered, than the case between Mrs. Anderson and the lien creditors of this bankrupt at the hearing of December, 1875, upon which the decree of April 13, 1876, was rendered.

I do not now think that I was under legal obligation to require an amended petition to be filed by Mrs. Anderson. I am of opinion that all the creditors were bound by the decree of April, 1876. They were bound technically, because they were parties to the bankruptcy proceeding under the publications that had been made in bankruptcy. They were bound justly, because they had been efficiently and zealously represented by counsel during the whole period of more than two years, during which Mrs. Anderson's petition had been pending and progressing to a hearing. In point of fact, Mrs. Anderson's litigation was not with the lien creditors. Their claims were not contested in a single instance to the extent of a single dollar. They were conceded to be due. Her litigation was with the assignee as to what had passed to him by the adjudication in bankruptcy. It is true that the creditors were interested in the question, what estate passed to the assignee; but that officer was competent to contest that point, and they were not necessary parties to its litigation. They would never have been considered by the court as parties but for the agreement of December, 1872; and it was solely with reference to that agreement that they were afforded an opportunity and the privilege of coming into the litigation.

I gave Mrs. Anderson leave to file a petition which should make all lien creditors for whom Mr. Wade had signed the agreement of December, 1872, formal parties by name to her litigation. This leave was confined to those creditors. It was a requirement upon Mrs. Anderson,—a burden imposed, and not a boon conferred. It was for the benefit of the creditors, and really a leave given them to come in and contest the pretensions of Mrs. Anderson. How have they availed themselves of this privilege, which I conceive that the court was under no legal constraint to afford, and which it accorded out of mere grace? This will appear from what transpired after the thirteenth April, 1876. Appeal for supervision was taken from the decree of that date, which, on the twentieth May following, the chief justice dismissed, on the ground that has been stated. Very soon thereafter Mrs. Anderson's counsel, Mr. Stiles, began a correspondence with Mr. Wade for the purpose of making up a correct list of the lien creditors who were to be made by name parties defendant to the amended petition. In reply, Mr. Wade wrote under date of July 24, 1876, from a watering place in Montgomery county, a letter containing the following passage: "In the matters pending in the state court I represented the judgment creditors as they appeared by petition or otherwise down to and including Floyd Smith, (except Hartman & Straus,) being the first twelve in the list forwarded to me." The list com-

menced instead of ending with Floyd Smith. The last of the 12 was Elizabeth Gibbony, executrix of Robert Gibbony, who was doubtless meant. See *ante*, 487, for a list of these creditors, in the order in which they were named in the petition. Alluding to the creditors in the Montgomery suit, he said that those represented by himself "embrace all that could by any possibility have derived anything from the sale of the lands of Anderson if the court had settled that he owned a fee-simple title in the same, the aggregate amount of their judgments being in excess of the value of the lands. I think, upon a careful examination of the list, I can act for all the other creditors except Barrett & Higgins and Miller & Co.;¹ and I will either act for them or get Major Taylor to accept service of process as their counsel. This will relieve you of the necessity of service of process as to any of the creditors. * * * I agree that the testimony now filed in the cause on both sides may be read in evidence upon the issues upon the amended petition, to the same effect as if notice had been given to all the parties, but subject to all just exceptions from any other cause. Prepare your amended petition and send it to me here by the eighth August. I will then indorse acceptance for such creditors as I represent, and get Major Taylor to do the same for the other creditors, he and I representing all the creditors." The amended petition was accordingly sent him by Mr. Stiles on the fifth of August, 1876, having attached to it, as exhibits, lists of the lien creditors of the bankrupt. This petition appears to have been lost or mislaid by Mr. Wade for a long time, and was not returned to Mr. Stiles until February 3, 1880; the exhibits not until several months later.

Meanwhile notice had been given to Mr. Stiles of a motion on the part of some of the creditors to remove the case to the Western district of Virginia, at Lynchburg, which motion was once abandoned, then renewed, and set for hearing October 30, 1880, argued several times on several different grounds, always strenuously resisted by Mrs. Anderson's counsel, but finally granted June 16, 1881, as has been seen. Through the failure of the movers to comply with the provisions of the statute in respect to removals, the papers were not actually brought to Lynchburg until the thirtieth of August, 1881. On the seventh of January following, notice was given by creditors of a motion to dismiss the original petition of Mrs. Anderson, and to set aside and annul the original restraining order granted upon it.

The notice was signed by John J. Wade and T. E. Sullivan, attorneys for James R. Kent's administrator, and Robert Gibbony's executrix, and others. These were the same counsel that had represented the assignee and all the creditors in the elaborate and protracted proceedings in the case, while pending at Richmond. The notice fixed the hearing for the sixth of February, 1882, in chambers, at Charlottesville, before Judge Rives, then judge of the Western

¹ These had no part in the agreement of December, 1872, and had no right to be made parties to the amended petition.—HUGHES, J.

district. This being but a month before the spring term of the court at Lynchburg, the hearing was adjourned to the latter place in term. The matter was afterwards several times delayed or continued, at the instance of counsel for creditors, but finally, at the fall term held at Lynchburg in September, 1882, where, in consequence of the resignation of Judge Rives, I sat by designation, the motions to dismiss and set aside were overruled, and the amended petition of Mrs. Anderson was filed, against the opposition of counsel for the creditors of the bankrupt, who strove again for delay.

The petition was filed, and all creditors for whom Mr. Wade had signed the agreement of December, 1872, were served with process to answer it, either by actual service or by acceptance of service by counsel, except D. Preston Parr and Samuel Straus, surviving partner of Hartman & Straus. These latter were non-residents residing in Baltimore, Maryland, who had small claims of about \$175 each. Mr. Wade had signed for them the agreement of December, 1872, and had represented Parr subsequently in the court; certainly as late as his letter of the twenty-fourth July, 1876, which was after the decree of April, 1876. They were both cognizant of the proceeding of Mrs. Anderson, and of its full purport. This fact is shown by their affidavits to petitions and answers now filed in the record, which were prepared by Mr. Wade for them in Baltimore, and to which they swore on the twenty-fourth of March, 1883, during the term of this court at Lynchburg, which had commenced on the 20th, and to which process that had been served on resident defendants to the amended petition of Mrs. Anderson was made returnable.

At the beginning of the term of court just mentioned, Mr. Sullivan, one of the counsel for lien creditors, was present, and asked the court to defer action on the petition until Mr. Wade, his associate, who was expected in a day or two from Baltimore, would be present. No answer was presented or defense made by any of the 12 defendants to the petitions, and Mr. Sullivan soon disappeared. The court deferred action in the matter for a week, and, none of the defendants having made objection, the final decree of March 26, 1883, was entered. This decree was, in substance, but a repetition of the decree of April 13, 1876. The 12 lien creditors who, through Mr. Wade, were parties to the agreement of December, 1872, had been allowed the privilege of coming personally into court and contesting the claim of Mrs. Anderson. Process had been served on, or service of it accepted for, them by 10 of the 12. The other two, who were creditors for considerable amounts, were aware of the petition, but had not come into court. Instead of coming promptly in while there was yet opportunity, these two had remained away and contented themselves with preparing dilatory papers four days before the end of the term at Lynchburg, and sending them to counsel here too late for them to be filed during the term. Their counsel, Mr. Wade, who had represented most of the other creditors, and had accepted service of process for

these others two months before, and who lived in Baltimore, where D. P. Parr and Samuel Straus resided, and who prepared their papers for them, and was in correspondence with counsel here in their behalf, instead of appearing at Lynchburg and making defense for the other creditors, as Mr. Sullivan, his associate, informed the court that he would do, remained in Baltimore, where he prepared the dilatory papers which reached counsel in Lynchburg eight days after the term of court had commenced, and a day after the decree of the twenty-sixth March was entered.

By requiring Mrs. Anderson to file an amended petition, making the 12 creditors parties defendant to it by name, the court had accorded these defendants a privilege. Notwithstanding this concession to them, these creditors by counsel resisted the filing of the amended petition, and when it was filed, and they were summoned into court, failed to appear. The court did more than it was called upon *stricti juris* to do, when it required that they should be made parties. When, on being summoned, or apprised that the privilege was accorded them, they failed to avail themselves of the opportunity of making personal defense, the court could do nothing but grant the decree in favor of Mrs. Anderson, which it entered at Lynchburg near the close of the March term of 1883. The defendants Parr and Straus were in fact bound by the decree of April, 1876, being, as creditors, parties in court under the publications in bankruptcy. They were, besides, during the March term of 1883, personally cognizant of the petition of Mrs. Anderson, to which they signed an answer, and of the privilege which the court had accorded them of making defense to it. They failed to make that defense in time; and the court is not at liberty, with any respect for the rights of Mrs. Anderson, who has been a patient and diligent suitor at its bar for 12 years, to reopen decrees to which no substantial objection has been shown, and which were most maturely considered and deliberately passed, first in April, 1876, and next in March, 1883, and to which no effective appeal has been taken.

The petitions now before the court of several or all of the 12 creditors that have been mentioned, contain nothing substantially new. The objections which they raise to the decree of March, 1883, are all either strictly technical, or set out grounds that have been repeatedly overruled by the court in this proceeding; especially at the hearing at Richmond in December, 1875. The assignee and creditors were concluded by the decree of April 13, 1876, except from appeal. That they lost by invoking the supervisory instead of the appellate jurisdiction of the circuit court in May, 1876. Allowed by the decree thus unsuccessfully appealed from to come in and make defense to the amended petition, the 12 creditors failed to avail of this privilege, and permitted the decree of March, 1883, to be entered against them. Appeal from that decree was open to them. They could have invoked the appellate jurisdiction of the circuit court, but they neglected to do so. Several of the 12 creditors could have carried

the case beyond the circuit court to the supreme court of the United States. They all neglected the recourse which was thus open to them, and the door of appeal is therefore closed to the decree of March, 1883. They now ask a review here. After neglecting to ask the circuit court to review the district court, and then to ask the supreme court to review the decree of the circuit court, if adverse, they now adopt the expedient of asking the district court to review two deliberate decisions made by itself, one of them nine years ago. The right to ask a review of the decree of March, 1883, expired as to all cases pending at Lynchburg at the end of the term which commenced on the twentieth of March, 1883, which terminated not later than the night of the eighteenth of September, 1883. These petitions for review were none of them filed until the first day of the fall term of 1883, at Lynchburg.

Proceedings in bankruptcy, in matters plenary in character and assimilated to equity suits, (which counsel for creditors insist that Mrs. Anderson's petition is,) are required by rule 32 in bankruptcy to be conformed as nearly as practicable to suits in equity; and the eighty-eighth rule in equity forbids petitions for review, where appeal would lie, from being brought after the expiration of the term during which the decree complained of is rendered. All these petitions for review, therefore, having been brought after the expiration of the term which commenced on the twentieth of March, 1883, at Lynchburg, are brought too late, and cannot be entertained. I will enter a decree dismissing them all, as well on the merits as on the ground that they are brought too late.

PEARD v. JOHNSON.

(Circuit Court, S. D. New York. April 3, 1885.)

1. PATENTS FOR INVENTIONS—SCHOOL DESKS—PATENT No. 86,440, CLAIM 2.

The second claim of patent No. 86,440, granted to John Peard, February 2, 1869, for an improvement in school desks, construed, and held not infringing.

2. SAME—COMBINATION OF OLD ELEMENTS—VALIDITY.

In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise, it is only a mechanical juxtaposition, and not a vital union.

3. SAME—PATENT No. 115,232.

Letters patent No. 115,232, granted to John Peard, May 23, 1871, for an improved school desk, held void.

In Equity.

Frederic H. Betts, for complainant.

Francis Forbes, for defendant.

COXE, J. This action is founded upon two patents, No. 86,440 and No. 115,232, granted to the complainant for improvements in school desks, February 2, 1869, and May 23, 1871, respectively. One of the objects of the inventor in the first of those patents, No. 86,440, was to furnish a school desk so constructed that the desk-board can be folded up out of the way, or turned up to serve as an easel. When used for the latter purpose, it is held in position by adjustable supports, having hooks formed upon their upper and lower ends, to hook over the edge of the desk-board, and the stationary part of the desk-top, respectively. The second claim of this patent is alone in controversy, and is as follows:

"(2) Supporting the desk-board E in an elevated position by means of the supports H, or equivalent supports, substantially as herein shown and described, and for the purposes set forth."

The defenses interposed are:

First, that the claim is functional and void; *second*, that mechanical skill alone is involved, and not invention; *third*, that as to one of the alleged infringing desks the claim, now 14 years old, is stale; *fourth*, non-infringement.

Assuming that the claim is not functional, and for that reason void, it must, in view of the state of the art, be limited to the apparatus described or its equivalent; it cannot be held to cover broadly every device for holding up a desk-top. So construed, the conclusion is reached that the defendant does not infringe.

The desk-board in this patent is attached to arms pivoted to the upper part of the standards, and so constructed that it may be used in three positions: horizontally, as a desk; perpendicularly, or nearly so, as an easel; and it may be turned over to form the back for a seat. It swings in all about 270 degrees. When used as an easel, it is entirely above the standards, and overhangs the seat in front, making it necessary for that seat to be vacated. The easel is too far distant from the scholar sitting in the seat behind to be used as a reading or book board, and can be used by him for drawing purposes only when standing. The supports, H, are movable, and can be taken off at pleasure. They may be made of two parts sliding upon each other, so that their length may be increased or diminished to hold the desk-board at any desired angle. When in use the desk-board is held rigidly in position. To move it, the hooks must be taken off. To change its angle as an easel, they must be adjusted by hand.

The defendant in the two exhibits said to infringe, has a desk-board pivoted at a point nearly midway between its front and rear edges; the rear edge turns upward, presenting the lower side to the scholar in the seat behind. The board swings between the standards and is brought so near that it can be used as a reading-board by a scholar while in a sitting position. A stop-hinge is used, having lugs on the hinge, which are turned against corresponding shoulders in the frame

by pressing the rear edge of the desk-board upward and forward, so that when the board assumes the proper position it is held there and prevented from going further in that direction. The hinge permits the board to assume two stationary positions only: a horizontal one as a desk; an upright one as a reading-board. From one of these positions to the other, a distance of about 145 degrees, the board can be turned at pleasure. It is thought that the stop-hinge is not an equivalent for the hooked rod in complainant's patent. To be an equivalent it must perform the same function in substantially the same manner. The two are different in construction, operation, and principle. *Rowell v. Lindsay*, 5 Sup. Ct. Rep. 507; *Eames v. Godfrey*, 1 Wall. 78; *Werner v. King*, 96 U. S. 218, 230; Walk. Pat. §§ 353, 361.

In the second patent, No. 115,232, the object of the patentee was to improve the construction of school desks and seats, making them more simple, convenient and comfortable. The desk and seat boards, supplied with a hinge having a concealed stop, fold up, filling the space between the supports. Ample unobstructed room is allowed for the scholars to pass between the desks, and the concealed stop renders it entirely safe for them to manipulate the desk-board. When the desk-board is turned up the under side alone is visible to the scholar. A reading-board, flanged and shouldered for the purpose of holding books, is attached to the under side of the desk-board and is held in position at the proper angle by means of wedge-shaped blocks. The scholar is thus enabled to read while sitting erect in his seat. The claims are as follows:

"(1) The flanged reading or book board F G attached to the under part of the pivoted desk-board B, substantially as herein shown and described, and for the purposes set forth. (2) A desk, B, pivoted brackets C C, having checks c^2 , and the circular end a^1 , of the frame, having recess with shoulders a^2 a^3 thereon, all combined with reading-board F G, and constructed and arranged as and for the purpose specified."

The defenses are lack of novelty and invention, and non-infringement. The conclusion that these claims are for an aggregation merely, cannot be avoided. Both are for combinations. The second claim contains an additional element, and is for a larger combination than the first.

The supreme court, in *Pickering v. McCullough*, 104 U. S. 310, describe, at page 318, with remarkable perspicuity, the essential requisites to a valid combination. The court say:

"In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seized each of every part, *per my et per tout*, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise it is only a mechanical juxtaposition and not a vital union."

Tested by this rule I am unable to understand how these claims can be upheld.

If to the under side of the desk-board, shown in defendant's patent No. 109,518, the well known church book-rest is attached, the product will be the precise invention described in the first claim. What is the one practical result produced by the action of all the elementary parts? In what manner do the desk-board and the reading-board co-operate to produce a common result? This question was fairly and frankly answered by the complainant's expert. He says: "They do co-operate in so far as they form a desk-board in one position and a reading-board in another position." A writing-desk is turned up for reading, and a reading-desk is turned down for writing. Is not this the precise fault found to be so fatal in *Reckendorfer v. Faber*, 92 U. S. 347? The desk-board performs its functions independently of the reading-board. So do the hinges. There is no joint action. Take away the reading-board, and the desk-board operates in precisely the same way. Each does when placed in juxtaposition precisely what it did alone. The reading-board does not influence or modify the action of the desk-board or of the hinges. Its action combined with them is in no respect different from its action when disconnected from them. It was a reading-board before; it is a reading-board still. No new feature is added to it by placing it in the position indicated. It is thought that the patent is invalid within the doctrines of the cases cited. See, also, *Hailes v. Van Wormer*, 20 Wall. 353; *Packing Co. Cases*, 105 U. S. 566; Walk. Pat. § 32; Sim. Pat. 47.

The bill is dismissed.

TRAVERS v. PALMER.

(Circuit Court, S. D. New York. April 3, 1885.)

PATENTS FOR INVENTIONS—HAMMOCKS—INFRINGEMENT.

Letters patent No. 217,964, issued to James P. Travers, July 29, 1879, for an improvement in hammocks, *held* not infringed by the hammock manufactured under patents issued to Isaac E. Palmer, in January and February, 1883.

In Equity.

Frost & Coe, for complainant.

Edwin H. Brown, for defendant.

COXE, J. This is an action to enjoin the alleged infringement of letters patent, No. 217,964, issued to the complainant July 29, 1879, for an improvement in hammocks. In the specification attached to the patent the inventor declares that the object of his invention is to form a new and improved hammock which shall be stronger, neater, and better adapted for its purpose than the hammocks now in use. He says:

"My hammock A is made or woven into an elastic open-worked fabric of cotton or other fiber, and is made of any length and width. It may be made plain or in colors. At the ends of the hammock A are secured eyelet-rings *a*, of metal or other suitable material. Through these rings *a* the suspensory continuous cord C passes and forms a grommet, D, for the purpose of securing the cord C to the rings B, of metal or other proper material. * * * The hammock A is bound with any suitable material, thus giving said hammock a neat and tasteful appearance."

The claim is as follows:

"The hammock herein described, consisting of the rectangular flexible open-worked fabric A, having a continuous outer flexible binding, provided with strengthening end cords F, and a series of eyelets, *a*, in its ends, continuous cord C D, and rings B, as and for the purpose set forth."

The claim covers the following elements:

First, the rectangular, flexible, open-worked fabric; *second*, the continuous flexible binding; *third*, the strengthening end cords; *fourth*, the eyelets; *fifth*, the continuous clew-line; *sixth*, the suspending rings.

The defense is non-infringement. An examination of the defendant's hammock, which is manufactured under patents issued to him in January and February, 1883, discloses the fact that he uses but two of these elements, viz., the material and the rings. He does not use the binding, the strengthening cords, the eyelets, or the continuous clew-line. It is contended, however, that for these, equivalents are adopted. That there is no outer flexible binding on defendant's hammock is conceded. But it is said that the selvage, formed by weaving the edges of the fabric closer than the general body, is an equivalent for the binding. This argument would be plausible were it not for the fact that the hammock offered in evidence, as made in accordance with the complainant's patent, also shows a selvage edge, not so wide, but similar in every other respect. There is, then, no substitute what-

ever for the binding, which, it is quite evident, is used for ornament only. The strengthening end cord, which, in the drawing, appears to extend entirely around the sides and ends of the hammock-body, is not found in the defendant's hammock. The lines of double sewing can hardly be regarded as an equivalent, and especially so in view of the fact that the same sewing appears on the complainant's hammock. The cord is intended to add additional strength to the sewing. Although the defendant uses no eyelets, it may be doubtful whether his loops formed of many strings running out from the ends of the hammock-body are not fair equivalents. It is, however, unnecessary to decide this question. The defendant does not use the continuous cord extending back and forth from the hammock-body to the ring. His cords are separate from and independent of each other. Of the six elements of the complainant's hammock the defendant uses but two, and possibly an equivalent for a third. As three of them are wholly absent from his hammock it must be held that there is no infringement. *Williams v. Stolzenbach*, 30 O. G. 891; S. C. 23 FED. REP. 39; *Watermeter Co. v. Desper*, 101 U. S. 332; *Blake v. City and County of San Francisco*, 5 Sup. Ct. Rep. 692; *Voss v. Fisher*, 5 Sup. Ct. Rep. 511; *Rowell v. Lindsay*, 5 Sup. Ct. Rep. 507; *Prouty v. Ruggles*, 16 Pet. 336; *Gould v. Rees*, 15 Wall. 187; *Seymour v. Osborne*, 11 Wall. 516, 555; *Gill v. Wells*, 22 Wall. 1, 14.

The bill is dismissed.

WABASH, ST. L. & PAC. RY. CO. v. CENTRAL TRUST CO. OF NEW YORK
and others. (Two Cases.¹)CENTRAL TRUST CO. OF NEW YORK and another v. WABASH, ST. L. &
PAC. RY. CO. and others.¹*(Circuit Court, E. D. Missouri. March 20, 1885.)*1. REMOVAL OF SUITS INVOLVING BOTH CONTROVERSIES BETWEEN CITIZENS OF THE
SAME STATE AND CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES.

Where a suit instituted in a state court involves both a controversy between citizens of the same state and a distinct, independent, and separable controversy between citizens of different states, either party to the latter controversy may remove the entire suit to this court.

2. CONSOLIDATION OF SUITS.

A mortgagor came into this court before default, alleged that it was going to default, and asked for and obtained the appointment of a receiver. The mortgagee filed a cross-bill to foreclose the mortgage, and also filed a bill in the state court to accomplish the same object. The complainant in the original bill, filed here, removed the suit in the state court to this court, and moved to consolidate said suits. Motion sustained.

3. RECEIVERS—APPOINTMENT AT INSTANCE OF MORTGAGOR—FORECLOSURE—JURISDICTION.

Seemle, that this court has power to appoint a receiver, at the instance of a mortgagor, where default is about to take place, and, upon the mortgagees filing a cross-bill after default to foreclose, it has jurisdiction to proceed to a decree of foreclosure.

Motion to Consolidate.

For a history of the original and cross bill filed here, see 22 FED. REP. 272. The bill was filed in the state court, because of doubts as to the jurisdiction of this court in the suit before it. The suit in the state court was removed, and the motion to consolidate made by the Wabash, St. Louis & Pacific Railway Company.

John F. Dillon, Henry T. Kent, Wager Swayne and Greene, Burnett & Humphrey, for the Wabash, St. L. & Pac. Ry. Co.

Phillips & Stewart, for the Central Trust Co.

John I. Brown and Thos. J. Portis, for the St. Louis, I. M. & S. Ry. Co.

BREWER, J., (*orally*.) In these cases, which were argued yesterday, and in which there is a motion made to consolidate, I think I can express my views better by commencing at the rear end of this litigation. The last suit was commenced by the filing of an original bill in the state court, in behalf of the Central Trust Company of New York, a bill of foreclosure, making the Wabash road, and the various mortgagees thereof, parties defendant. That the state court had jurisdiction of that suit is to my mind indisputable, and that it was a case which was removable to this court is equally clear, although some of the parties defendant, one at least, is a citizen of the same

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.
v.23F, no.11—33

state with the complainant, the Central Trust Company; for there is a primary, separable, independent controversy between the Central Trust Company, a citizen of New York, and the Wabash Railroad, a citizen of the state of Missouri, a controversy in respect to the mortgage given by the one to the other. Where there is such a separable, independent controversy between citizens of two states pending in a suit in the state court, either one of the parties to that controversy may file his petition and bond to remove the entire suit to this court, although thereby they bring into this court, if you please, another controversy between citizens of the same state. That is the clear language and scope of the decision in *Barney* against *Latham*, 103 U. S. 205; and followed by other causes. In other words, the supreme court there affirmed, as was well said yesterday, the doctrine that where there is in a suit a distinct, separable, independent controversy between citizens of two states, it is a case which may be removed into the federal courts, and the federal courts can take jurisdiction of it, and of the whole of it. In that respect, as said in a late opinion of the supreme court, the jurisdiction of the circuit court is larger than that which can be obtained by an action brought originally here. Hence that case—the last suit—is properly in this court; and that this court has jurisdiction of it, with all that is involved, we have no question.

In the foreclosure of a mortgage there is a certain sense in which you may say that the only indispensable parties are the mortgagor and the mortgagee. You can foreclose that mortgage and divest the mortgagor of all his interest, and transfer it by sale into the mortgagee, or any other purchaser, and that without the presence of other incumbrances as parties. And yet we all know that there are certainly proper parties, or may be proper parties, other than the mortgagor and the mortgagee. Subsequent mortgagees, of course, are proper parties in order to cut off any equity of redemption; and while it is laid down in the supreme court of the United States that an independent controversy between the mortgagor and a third party, one involving the question of paramount title, is not to be litigated in a foreclosure suit, yet all those things which simply involve matters of lien on the property, whether prior or subsequent, may, as a general rule, properly be considered in such a suit. Well, that case being one that is properly in this court, a motion is made to consolidate it with a prior case, a case brought originally by the Wabash road. It has been said that that original action was an anomaly. A mortgagor, before default, comes into a court of equity and says he is going to default, and wants the court to take possession of its property, the mortgagee saving nothing. It may be it is not a common action, and yet I believe it is not solitary nor the first. That application presented this state of facts to the court: that here was a vast property, running through several states, burdened with a variety of local incumbrances and obligations, whose value consisted largely in its being preserved in its entirety and with all its connections. Split up

into a hundred fragments, the aggregate value of the varied fragments, it was contended, would be as nothing compared with the value of the single, intact property; and the question was put before the court whether, two days before a default, when various rights of attack would arise in different parts of this territory, the court might anticipate and take possession of the property, and preserve it intact, in order to permit the general mortgagee, when default actually occurred, to file its bill for foreclosure, and have the property, as an entirety, sold? While, of course, there were matters, in respect to this, of doubt that required consideration,—and we did consider it carefully,—yet both of us then thought, and both agree now, that it was wise that it was so done, and that the court properly appointed the receivers.

Immediately after the filing of the bill, when the default came, the trustee in the general mortgage filed a cross-bill to foreclose such mortgage, and that cross-bill is pending with others. The object of the cross-bill, and the object of this original bill filed in the state court, is the same. Of course the query naturally arises, what is the necessity for this last? If there was jurisdiction in the court in the first suit, what is the necessity of the second? Speaking for myself, I think the court had jurisdiction over the first bill; that the cross-bill was properly filed; and that the court would have jurisdiction to proceed to a decree in that. And yet I cannot say that it was unwise to initiate the second suit, because here is an original bill filed in the state court, a court of unquestionable jurisdiction, long after the default had occurred. It is not always sufficient, to be sure, that the court has jurisdiction to render a decree; it is also often well to have the proceedings such that all parties interested are satisfied that it has jurisdiction, that there shall be no doubt existing; because a doubt tends to check bids at a sale, and prevent the property offered for sale from realizing its full value. Hence I see that there was a propriety, while I do not think there was a necessity, for this second suit commenced in the state court; and yet, that having been commenced, and having been transferred to this court, and the object of the suit in the state court and the cross-bill in the federal court being the same, I see no impropriety in consolidating the two and proceeding with them as one consolidated case. The parties are the same. There is, as stated, perhaps a technical change in the name of a single party or two, defendants in the state court, yet they are merely substituted trustees in some of the mortgages; so that the interests, the questions, the controversies, the real parties are identical in the two cases. The order will therefore be made for a consolidation.

Of course this cuts off no questions, as to any particular party made defendant, as to whether he is properly in court. He can still raise any question of that kind. He can deny that the controversy or the matter which is charged against him is one which is determinable in this case. Each individual defendant has his right to come into court and challenge the propriety of the proceeding as against him.

All we hold now is that the cases are properly before us, and that, with the unity of interest and the unity of questions and the identity of parties, the motion to consolidate is proper, and should be sustained; and it is so ordered.

TREAT, J., concurs.

LAUDERDALE CO. v. FOSTER.

(Circuit Court, W. D. Tennessee. April 9, 1885.)

JURISDICTION—EQUITY—SET-OFF—STATE AND FEDERAL JUDGMENTS.

The relation between the state and federal courts imposes a restriction upon the equity powers of either in setting off a judgment of the one against a judgment of the other. Where, therefore, a federal court of equity is asked to set aside the satisfaction of a state judgment at law or to determine equitable defenses to that judgment, as a preliminary to a decree of set-off against a judgment of the federal court itself, the parties will be sent to a state court of competent jurisdiction to settle their controversy, and in the mean time the federal judgment will be stayed.

In Equity.

Metcalf & Walker and *Thomas Steele*, for plaintiff.

Myers & Sneed, for defendant.

HAMMOND, J. The defendant holds the balance of a judgment at law in this court against the plaintiff, which, after adjusting the matter of credits claimed in the manner indicated by the court, on consideration of the master's report, amounts to \$2,052.83. This judgment he is seeking to enforce by *mandamus*. The plaintiff claims a judgment against the defendant in the circuit court of Lauderdale county for \$1,870.51. This bill is filed to set off one judgment against the other, and to adjust certain disputes as to credits claimed by the plaintiff and denied, which latter feature has been determined on exceptions to the master's report, and need not be further noticed. It alleges that the defendant is insolvent, and that the plaintiff has no opportunity to enforce its judgment by execution. There would be no doubt about the plaintiff's right to this relief, and no difficulty in granting it, but for the fact that on the records of the state court the judgment appears to have been "satisfied" by a levy upon and sale of defendant's land under an execution which issued on the judgment. 3 Meigs' Dig. (2d Ed.) § 2490. The bill states this, and seeks to avoid its effect by invoking the equitable powers of this court to set aside the entry of satisfaction, because, as is alleged, the sale was void, and the plaintiff took no title to the land, by reason of certain irregularities and defects which the bill points out. 1 Meigs' Dig. (2d Ed.) § 516; 2 Meigs' Dig. § 1753. It further alleges that the plaintiff disclaims all title under the execution sale; that, because the pro-

ceeding was void, it has never taken any steps to recover possession; that the defendant remains in possession, and has mortgaged the land for its full value; and that the mortgage would now absorb the property, on which the judgment is not now a lien, the statutory time for the lien having long since expired.

The answer of defendant neither admits nor denies the invalidity of the sale, but insists that the plaintiff must stand by its title to the land; that the proof shows there is no judgment, it having been satisfied of record; and that the plaintiff, having appropriate remedies to recover possession, cannot now claim further satisfaction through a set-off. It also sets up certain equitable defenses against the judgment, arising out of the fact that, under our state revenue system, it was procured against defendant as a surety on the county tax collector's bond, in a summary way, without any notice to him, and only on notice to the defaulting collector, and that, under those statutes, as such surety, he was entitled to certain advantages and privileges which have been denied to him by the plaintiff, whereby the judgment itself is void; and a court of equity will not enforce it.

The court concedes very fully the principle that equity, in exercising its powers to set off one judgment against another, requires that the plaintiff's judgment must be a subsisting claim capable of enforcement, and that if there be any obstruction to it the court will not interfere, but leave the parties to their mutual legal rights. *Wat. Set-off*, p. 380, §§ 349-355. But this must be understood as subject to the power of a court of equity to inquire into and remove the obstruction in a proper case for equitable jurisdiction in that behalf. *Id.* If this case were in the equity court of the state, and both judgments were those of the state court of law, or if both judgments were those of a federal court, neither court of equity could have any difficulty in deciding the question here raised. If a proper case has been made for the plaintiff, the satisfaction would be set aside, the judgment reinstated, and the set-off declared; or, on the other hand, if there be any validity in the equitable defenses set up by defendant, the court would give effect to them by refusing the set-off and restraining by injunction any further vexation on account of a void judgment. Thus complete equity would be meted out to these parties.

As it is, however, this federal court of equity has no jurisdiction to scrutinize the records of a state court, correct them by setting aside an entry of satisfaction appearing thereon, and adjudicating upon the validity of the proceedings, to bind these parties in a matter like this. Of course it could, whenever the matter came up in litigation, determine whether any title to the land had passed or any controversy over or involving the title; but that is not what we are asked to do; we are asked to vacate a satisfaction of record, re-establish a judgment of a state court, and satisfy it by a set-off; which, I think, we cannot assume to do. On the other hand, neither can we inquire into and

adjudicate upon the equitable defenses set up in behalf of defendant to the judgment, for the same reason precisely, and because we are forbidden by statute to enjoin a state judgment or execution. Rev. St. § 720. This statute is the declaration of a principle which, necessarily, must prevail to preserve harmony in our system of government, and substantially controls this court to refuse its relief both to the plaintiff and defendant in this matter of dealing with the state judgment. So, too, the state court of equity cannot enjoin the federal judgment we have here, or otherwise interfere with it.

At first it seemed to me that the logical but unfortunate result of this situation would be to dismiss this bill; but on reflection I am satisfied that would be wrong. It would defeat the plaintiff in the collection of its debt, for which it already has a judgment, and *prima facie* a valid one, if it has not been satisfied. It would allow an insolvent debtor, while still in possession of the land sold under execution, to keep the land and deny the debt, and by a mortgage to displace the judgment, levy, and sale. The defendant would collect his money from the plaintiff and render its claim against him fruitless, no matter how just, for this is all with which he has to pay. However, the accidents of this particular case should not control our judgment here. The true principle is that our duplex system of government has imposed upon our state and federal courts of equity, in their relation to each other in this matter of dealing with judgments at law, restrictions upon their respective equitable powers which otherwise would not exist. To do complete equity between the parties here, for example, requires essentially the concurrent and co-operative action of both a state and federal court, while, under ordinary circumstances, either court could give full relief. By sending these parties to the state courts, to take within a reasonable time such action as they may be advised to settle their controversy over the state judgment, we do no violence to the comity between the courts, and usurp no intolerable jurisdiction; while, in the mean time, we can stay our own judgment and await a settlement of that controversy in a court of competent jurisdiction. But since the defendant's judgment against the plaintiff must be collected by taxation, which, under our process, is a very slow proceeding, I do not think it proper to delay the levy and collection of the money, but direct that it shall be paid into the registry of the court, to be invested and held for the party to whom we may ultimately decree it. The only objection is that this may be imposing a tax on the county which it possibly need not levy, but that is largely its own fault in not sooner taking the necessary steps to vacate the satisfaction of its judgment. Besides, the sum is not large, and if the money goes back into its treasury, it will be in exoneration of future taxes, and no great harm is done. The surplus must, of course, be paid to defendant. Either party may have leave to apply for further directions. Decree accordingly.

ST. LOUIS, K. C. & C. R. Co. v. DEWEES and others.¹*(Circuit Court, E. D. Missouri. March 28, 1885.)***1. APPOINTMENT OF RECEIVER OF UNOCCUPIED RAILWAY PROPERTY WHERE POSSESSION AND TITLE ARE IN DISPUTE.**

Where the title to an unused railroad track is in dispute, and both parties to the controversy claim possession, and neither is in actual physical possession, a court of equity will not interfere in a suit to quiet title by appointing a receiver, even where the defendant has attempted to take forcible possession, until the right to possession is established at law.

2. SAME.

Semble, that the proper way in such cases is to establish both title and possession at law.

Bill to Quiet Title. Motion to appoint a receiver.

The bill states, among other things, that the defendant has attempted to take forcible possession, and prays for an injunction, and the appointment of a receiver to take charge of the property in dispute, pending the proceedings herein, or until the further order of the court.

Noble & Orrick, for complainant.

Farrish & Jones, for defendants.

BREWER, J., (*orally*.) In this matter, Brother Noble, which you and Mr. Orrick presented yesterday, we have read your briefs and listened to your arguments with a great deal of interest and pleasure, as we always do, but it seems to us they beg the important question, a question yet unsettled, and that is the question of possession. A party in conceded, open, notorious, actual possession is entitled to have that possession protected in a court of equity as well as in a court of law; but upon the affidavits,—I do not want to say that your's do not make a case in your behalf, yet they are contradicted by the affidavits of the defendants,—it impresses myself and my Brother TREAT that this question of possession is as yet unsettled. It is a disputed fact. It is a thing which you cannot proceed upon as a basis from which to build. If it was settled,—if we thought that the possession was established, and that here A., B., and C. were, in the manner you indicate, undertaking to crowd you out of possession, why, it would impress us very differently from what it does now. I can understand how, for instance, in a building—your own home—you are in it; your family is there; possession is actual; it is open, it is notorious; and anybody who attempts to interfere therewith meets the matter of possession as an established fact. If it is a piece of land upon which there is no improvement,—an open quarter section of land, or, as in this case, a track over which no trains have been run for the last year or two; a sort of dead, empty, open property that is not tangibly, physically occupied,—it impresses me, and impresses my Brother TREAT, (and in that we agree very positively,) that the right

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

to possession should, by some legal proceeding, be established before any further action is taken.

Of course, in an ordinary action at law, the right to possession can be settled. I do not mean to say you have not possession, and that these gentlemen on the other side are not trespassing upon that, but it does impress us that, upon the affidavits, there is that doubt hanging over the question—that uncertainty as to your possession—which forbids the court interfering in the summary way. Of course we would like to do everything in our power to prevent any physical violence,—any lawless acts; and if this case stood alone by itself, with never a chance of another to follow it, we might, on the suggestions and arguments you have made, feel we were doing society good by taking possession. Yet the action we take upon this matter will lie before us as a precedent in the future, and to that extent, at least, limits our discretion. So far as the possession, in the first instance, of the Forest Park Railroad Company is concerned, it is unquestioned. It built the road; it was in possession; did the work; procured and laid the iron. Now, whether its possession has been ever, in fact, transferred to you, is one of those questions which we think, on affidavits, is not clear. The corporation, as a corporation acting through its directors, never transferred possession. No officer of the court ever transferred possession. You do say that Mr. Shultz, vice-president and acting manager, did transfer possession,—we can only speak from what is developed in the affidavits here, and from that it would seem to us as though he had forgotten the obligations of consistency, and had trifled with one or other of the parties in interest,—yet it does not seem to us that you have established that actual, indisputable, acquiesced possession which puts you in a position where you can invoke the power of this court for its protection. We think that the true way for you is to first establish your legal title to that possession. If the charge had been made here the other day that these defendants were likely to take up the iron and carry that away, and thus destroy the property, why that would have put the question in a different shape before us. But that was not suggested. It does come before us in the light that possession to-day is of value; not that either party is going to take up the track and destroy the property as a property, but that there are other matters not fully developed in the testimony,—some supposed advantage in present possession in reference to other outside connections.

While we should like to do all possible to preserve the public peace under the circumstances, yet we do not feel that the case is so clearly presented to us, in respect to your actual possession, that we ought to initiate the plan of appointing a receiver,—dispossessing both parties; for, if we put the property in the possession of a receiver, it looks to us very much as though we would have a receiver taking charge of a piece of dead property like an open quarter section of land, and just put in his possession for the sake of keeping the par-

ties who claim it out of possession,—a receiver who could not do anything with it, who could not build the road, who could not operate it because there is no rolling stock, and no connection with any other road, and no opportunity of doing anything, but simply put in possession to keep your client, and Mr. Davis' client outside, and hold it while you proceeded to litigate the title and right to possession.

We think the true way is that the question of title and possession should be settled by an action at law, and that will end all controversy. We have looked at it for the last two or three days, on these different facts, in all the lights and shades suggested, and we feel constrained to deny the application for a receiver. Mr. Brother TREAT suggests, if we should carry this to the extent to which you claim, we should be having this court pushing the doctrine of receivership to the extent of making us justices of the peace, and issuing peace warrants.

BLAIR, Trustee, v. ST. LOUIS, H. & K. R. Co. and others. (NORTON, Intervenor.¹)

(Circuit Court, E. D. Missouri. March 19, 1885.)

1. RECEIVERS—ANTE-RECEIVERSHIP DEBTS—ATTORNEYS' FEES.

A claim of an attorney against a railroad, for fees earned a year and a half before the appointment of a receiver, is not entitled to any preference.

2. SAME—ATTORNEYS' SALARY.

Where the annual salary of the attorney of a railroad falls due only a short time before the road is placed in the hands of a receiver, his claim against the company is entitled to priority over that of mortgage bondholders.

3. SAME—PAYMENT OF JUDGMENT AGAINST ROAD.

One who pays a judgment against a railroad company a few weeks before the appointment of a receiver, under an agreement that the amount so advanced shall be repaid by the company, is not entitled to priority over bondholders.

In Equity. Exceptions to master's report.

Theo. G. Case, for complainant.

John O'Grady, for receiver.

James Carr, for intervenor.

BREWER, J., (*orally*.) In the exceptions which have been argued to the reports of the master in the case of *Blair* against *St. Louis, Hannibal & Keokuk Railroad*, the first that I shall notice is that in the case of *Norton* against *Railroad Company*, where three sets of claims were presented.

The first was for services as special attorney in two or three cases, a year and some months prior to the appointment of the receiver, amounting to \$135. The master disallowed that; that is, he recog-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

nized it as a claim against the company, but refused to give it priority over the mortgages. In that, I think that he was right. While, of course, as we in the profession all agree, lawyers are benefactors to the race, and entitled to special consideration at the hands of any intelligent tribunal, yet I think that the lawyer who waits a year and a half before collecting his fees is guilty of great negligence. He certainly presents no equitable claims for preference.

The second claim is for salary for the year prior to the appointment of the receiver. The master finds, and that fact is not challenged, that he was to be paid a salary of a thousand dollars, payable at the end of the year, which amount became due just before the appointment of the receiver; and it is insisted on the part of the bondholders that that is not a claim of a character to be recognized and awarded priority; in other words, that the services of an attorney are not necessary to the operation of a railroad. The counsel seemed to liken this to the rulings under that statute, in force in some states, making a railroad company responsible to one employe for the negligence of a co-employe. Such statute has been held to refer only to that negligence which occurs in the management of the trains, the actual operation of the road, something which is attended with peculiar risk, and so justifying an exception to the general rule of masters' liability. It does not seem to me that in that idea is to be found the true test. I think that whatever is necessary in the ordinary administration of the affairs of the corporation, comes within the spirit of the decisions of the supreme court; and that an attorney's services are thus necessary is very clear. That exception made by the bondholders will be overruled, and the allowance sustained.

The third arises upon these facts. It appears that this gentleman, the attorney of the road, paid off sundry judgments, rendered before justices of the peace, against it, paid certain claims for wages, and for stock killed, etc., and paid them under an arrangement, between himself and the president of the company, that the money thus advanced by him should be repaid by the company on the first of January, 1884. This was only a few weeks before the appointment of the receiver, and his claim is that, having paid these liabilities of the company, at its instance, under a contract by which repayment to him was to be made at a time within less than six months before the appointment of the receiver, such debt should be preferred to the mortgage. We do not think so. It amounts simply to this: He loaned the company so much money, but the bondholders had loaned theirs long before, and loaned it secured by a lien. If he had taken a mortgage at the time of making this loan, and thus obtained a lien, no one would contend that he thereby obtained priority over the earlier loan. That is all this transaction amounts to. He loaned so much money to the company, but did not take a lien. Now he asks that, not having taken a lien, and having loaned the money a few weeks before the appointment of the receiver, that he should obtain priority

over those who loaned money three or four years or more ago and then took a mortgage. All the exceptions in this case of Norton's will be overruled.

BLAIR, Trustee, v. ST. LOUIS, H. & K. R. Co. and others. (NORTON, Intervenor.¹)

(Circuit Court, E. D. Missouri. March 19, 1885.)

RECEIVERS—ANTE-RECEIVERSHIP DEBTS—SURETY ON APPEAL-BOND.

Where a judgment is recovered against a railroad company in an inferior court upon a claim not entitled to priority, and an appeal is taken, and the company's attorney goes on the appeal bond, and a receiver of the road is thereafter appointed, and after his appointment a judgment is recovered in the appellate court against the company and the attorney, and the latter pays it, his claim is entitled to no priority over that of mortgage bondholders.

In Equity. Exceptions to master's report.

It appears that the intervenor paid the judgment referred to in the opinion of the court.

Theo. G. Case, for complainant.

John O'Grady, for receiver.

James Carr, for intervenor.

BREWER, J., (*orally*.) The other case of *Norton* against *The Same Road* presents a different state of facts.² There, the same gentleman, who was attorney for the road, at the instance of the president, went surety on appeal-bonds. Cases were pending before a justice of the peace in the latter part of 1873, a few months before the appointment of the receiver, and after judgment there the company appealed, and he signed the appeal-bonds. The cases went to the circuit court of the state, and on trial there, after the receiver's appointment, judgments were rendered against the company, and against him.

Well, not one of the claims sued on before the justice would be entitled to priority. They date back two or three years before the appointment of the receiver, and it would be strange if, when the claims in the first instance were not of a character entitled to priority over a secured and registered indebtedness, that an attorney of the road could, by simply giving his services as surety on appeal-bonds, indirectly secure the payment of those claims in priority to the mortgage debts. We think the ruling of the master in that was correct, and the exception will be overruled.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

²See other case of same title, which was decided immediately before this one.

BLAIR, Trustee, v. St. Louis, H. & K. R. Co. and others. (GREENE, Intervenor.¹)

(Circuit Court, E. D. Missouri. March 19, 1885.)

MORTGAGES—SURRENDER OF BONDS UNDER SCALING ARRANGEMENT—LIEN FOR PORTION OF REDUCED INDEBTEDNESS, FOR WHICH NEW BONDS WERE NOT ISSUED.

The indebtedness of a railroad was scaled down,—old mortgage bonds were surrendered, and new issued. A creditor surrendered his bonds, and received new ones for all, except a small portion, of the reduced indebtedness to him. No bond was issued for it, because no bond was issued for so small a sum. *Held*, that said creditor is entitled to a lien, equal to that of other mortgage creditors, for the whole amount due him.

Exceptions to Master's Report.

Theo. G. Case, for complainant.

John O'Grady, for receiver.

Fogg & Hatch and James Carr, for intervenor.

BREWER, J., (*orally*.) In the case of *Greene* against *The Railroad* this state of facts is presented: It appears that this gentleman held at one time, I think, \$20,000 of bonds. (I may not have the figures correctly.) The indebtedness was scaled down, and new bonds were issued. He surrendered his old bonds, and received new bonds for a portion of that amount; but there was a fraction over, \$500 or \$600, and no bonds apparently issuing for that limited sum, he holds that claim unadjusted, or rather unsecured by a bond. The master has allowed this as a claim against the company, but holds that it is inferior to the mortgage,—this new mortgage that was created at the time the debt was scaled down. In that, we think he is mistaken; that as Mr. Greene held the amount of the original indebtedness—\$20,000—as a prior and secured debt, and surrendered it for the mere purpose of having the indebtedness scaled down, he is entitled for all of the reduced obligation to come in with the present bondholders on the same standing; that although he has an amount here of \$500,—not enough to make a full bond,—yet his debt in equity stands on the same footing as that of those who have received bonds. So in that respect the exception will be sustained, and the debt will be held to be of equal lien with the mortgage debt, and paid out of the proceeds of the sale, the same as the other mortgage obligations.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

KELLOGG and others v. Root and others.

(Circuit Court, W. D. Michigan, S. D. March 30, 1885.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—HOW. ST. MICH. §§ 8739, 8744—FRAUDULENT PREFERENCES.

A creditor in Michigan may take security by mortgage, or otherwise, from an insolvent debtor, with knowledge of his financial weakness, so long as the creditor has no notice or knowledge that the debtor contemplates making an assignment, but the security must be given at the instance of the creditor, be duly delivered, and he must have no notice or knowledge of any fraudulent purpose, within the meaning of the statute.

2. SAME—CHattel MORTGAGES HELD VOID.

When an insolvent, at his own instance and convenience, voluntarily gives some of his creditors security, it is at once a suspicious circumstance, and it followed within a short time by an assignment, the conclusion will be justified, in the absence of other controlling circumstances, that both were contemplated, and should be deemed in law one transaction; and such securities will be held void. Chattel mortgages *held* void.

In Equity.

Smith, Nims, Hoyt & Erwin, for complainants.

Norris & Uhl, for defendants, Root & Co.

Mitchell, Bell & McGarry, for defendants, Stone & Porter.

WITHEY, J. Kellogg & Co., the complainants, are creditors of Ellen H. Stone, who, on the tenth of March, 1884, signed two chattel mortgages covering her entire stock of goods, in Portland, Ionia county: one to her father-in-law, Darius Stone, of that place, for \$6,176.90; the other to the defendants, Root & Co., of Detroit, for \$4,778.83, aggregating about \$11,000. Her husband, Allen Stone, was her man of business, who, as her agent, managed the store and conducted her affairs. He had the mortgages prepared, took them to Mrs. Stone to be executed, and when she had signed them, they were handed back to him, one to be filed in the town clerk's office, the other to be handed to Darius Stone. Neither of the mortgagees were present, or knew that the mortgages had been prepared or signed until a subsequent day. Allen Stone had them in his possession until March 17th, at about 5 o'clock P. M., when he lodged them in the proper office to be filed. In the mean time he had caused to be prepared a common-law assignment for the benefit of Mrs. Stone's creditors; had conferred with the defendant Porter, and procured his assent to act as the assignee. From the clerk's office, after filing the mortgages, Allen Stone proceeded directly to the store, and within two hours the assignment was executed and delivered to Porter, together with the assigned property.

The bill of complaint sets up the facts in the case, and prays that the mortgages be declared void; that the assignee be enjoined from paying them; that a receiver be appointed to take charge of the assigned property, and enforce the trust. There is also a prayer for general relief. On the motion for an injunction and for the appoint-

ment of a receiver, both were refused, but the cause was retained for hearing upon the merits.

The statute of this state declares that all common-law assignments which give a preference to one creditor over other creditors shall be "void." How. St. § 8739. The deed of assignment, on its face, is not open to the objection that it gives a preference; but it is claimed that the transaction of Mrs. Stone, touching the mortgages and the assignment, manifest an attempt to evade the statute, and should be considered as one transaction. The supreme court of Michigan has given construction to the statute in question as regards some of its bearings on this case: The provision already alluded to, "that all assignments, commonly called common-law assignments, for the benefit of creditors, shall be void unless the same shall be without preferences as between such creditors." And the sixth section of the act, (How. § 8744,) which reads:

"In case there shall be any fraud in the matter of said assignment, or in the execution of said trust, or if the assignee shall fail to comply with any of the provisions of this act, or fail or neglect to promptly and faithfully execute said trust, any person interested therein may file his bill in the circuit court in chancery of the proper county for the enforcement of said trust, and the court, in its discretion, may appoint a receiver therein," etc.

The construction is that the general intent of the statute is to secure equal distribution of the property of insolvents among all their creditors, and if preferences are fraudulently attempted, the intervention of a court of equity to prevent it is authorized. Commenting on the first section, the court says:

"The statute declares the assignment 'void' if the bond is not filed; but this word is frequently used in the sense of voidable, and it must have that construction here if it shall be necessary to give other provisions of the statute effect." *Fuller v. Hasbrouck*, 46 Mich. 78; S. C. 8 N. W. Rep. 697.

The bill in the case at bar is filed on the theory that, although preferences were given, the assignment creates a trust, and is to be enforced, the preferences alone being void; and such view is upheld by the case referred to, and will be followed by this court as manifestly the correct construction of the statute, and which we must accept.

About two months prior to the time the assignment was made, Allen Stone, the husband of Mrs. Stone, applied to her creditors for an extension of their claims, among them to Root & Co., who were then informed concerning her financial condition: that she could not then pay all her creditors promptly, but if they would grant her an extension, he thought she would be able to pay them. Root & Co. refused, except on the terms that they should be secured, and Stone promised to give them security, in case his wife consented. Root & Co. then prepared and sent by mail to Mrs. Stone four notes, each for \$887.55, payable in two, three, four, and five months, which she signed and returned, but gave no security at that time. On the tenth

of March following, as already stated, she signed the chattel mortgage on her stock of merchandise, and wrote to Root & Co. the same day, "I have this day made a chattel mortgage in your favor, on my stock of goods, for \$4,778.83, which I will place on file for you." The letter was received on the twelfth of the same month, to which no reply was made. The mortgage, it is seen, was for an amount in excess of the indebtedness in January of \$1,228.63, but it seems this excess was for goods sold since January, and not paid for.

Previous to applying to creditors for an extension, Mrs. Stone, through her husband, had made unsuccessful efforts to borrow three or four thousand dollars with which to meet pressing debts, and failing to find any one willing to lend on the security that she could give, the extension was applied for, which was not entirely successful, as has been seen. She owed \$17,791; her assets were appraised by the assignee at \$14,243; and they have produced a total of \$10,742, something less than the sum of the mortgages. It is safe to say that any person of ordinary business knowledge and experience, under such circumstances as we have alluded to, would not fail to understand that Mrs. Stone was insolvent, and our conclusion is that both Mrs. Stone and her husband knew, or were bound to know, that such was the fact. I presume they may not have known the extent of the utter hopelessness of her affairs as disclosed by the inventory and appraisal, but they knew enough for them to understand, at the time she executed the mortgages, on the tenth of March, that she could not continue in business.

It will be noticed, the mortgages were made and signed in the absence of the mortgagees, and, though some time previous they had requested security, the giving of the two mortgages in question were, when given, the voluntary acts of the mortgagor. At that time, Mrs. Stone and her husband contemplated, in my opinion and understanding of the facts, making the assignment which she did make seven days subsequent. If I am correct in my conclusion, then it is manifest that, within the meaning of the statute forbidding preferences in an assignment, the making of the mortgages and the deed of assignment will be deemed in law to constitute one transaction. This being so, the preferences are to be regarded as void; and the deed of assignment is to be upheld and enforced in accordance with the case of *Fuller v. Hasbrouck*, *supra*.

It does not change the views expressed, that the mortgagees had no notice or knowledge of the contemplated assignment at the time the mortgages were signed or placed on file, for the reason that they were not actors or participants in the giving of the instruments of security. They were intended as preferences by the only party who had to do with their creation, or who had any intention concerning them; and this party's purpose then and there was to give preferences by means of the mortgages, and follow them by a general assignment in the near future. They were, therefore, fraudulent and void at their in-

ception as against other creditors, and could not be thereafter delivered as valid instruments. True, about two months prior to the assignment, Root & Co. requested and were promised security, and it is also true that Darius Stone had requested and been promised security for indebtedness of Mrs. Stone to him of something over \$3,000; but the mortgages were not made to either of them under any contract, nor in compliance with the terms of such requests and promises. The mortgage to Root & Co. was for more than \$1,200 in excess of the debt owing to them when such promise was made, and the mortgage to Darius Stone covered indemnity for \$2,500 of paper indorsed by him for Mrs. Stone, which had not been paid when the promise was made to him, and was not included in it. The question is not whether, as between Mrs. Stone and the mortgagees, in the absence of rights of *bona fide* creditors, the mortgages would be valid, but whether, in view of the facts of this case, they are valid.

When Allen Stone, who managed the entire business, was asked, as a witness, why so much delay took place, after one of the parties had requested and been promised security, before the mortgage was executed, he answered as follows:

"I knew the minute that mortgage was put on file, that minute the credit of the concern was ruined. I knew that, and that was the reason I staved it off as long as I could."

This was true as to both mortgages; and reveals the true state of his mind, and explains why he held the mortgages for seven days without filing in the clerk's office, and why, in the intervening time, he perfected arrangements for having the assignment made within two hours after the mortgages were placed on file by him. No one, it would seem, can escape the conviction that Stone and his wife contemplated making the assignment at the time the mortgages were signed. The making of a mortgage and an assignment under like circumstances, have been held to be one transaction, because one in contemplation, and correctly so. *Perry v. Holden*, 22 Pick. 269; *Berry v. Cutts*, 42 Me. 445; *Doggett, Bassett & Hills Co. v. Herman*, 5 McCrary, 269-272; S. C. 16 Fed. Rep. 812. See the recent case decided by the supreme court of Michigan, Judge CHAMPLIN's opinion, concurred in by Judge COOLEY, *Heineman v. Hart*, reported in 20 N. W. Rep. 792, October 25, 1884.

The case at bar was not one where a diligent creditor was present, and pressing for security from his insolvent debtor. I do not question, in view of the decisions by the supreme court of Michigan, the right of a creditor to take security by mortgage or otherwise from his insolvent debtor, with knowledge of his financial weakness, so long as the creditor has no notice or knowledge that the debtor contemplates making an assignment; but the security must be given at the instance of the creditor, be duly delivered, and he must have no notice or knowledge of any fraudulent purpose, within the meaning of the statute. When an insolvent, at his own instance and convenience,

voluntarily gives his creditor security, it is at once a suspicious circumstance, and if followed within a short time by an assignment, the conclusion will be justified, in the absence of other controlling circumstances, that both were contemplated, and should be deemed in law one transaction. Such is the case at bar, under the evidence, as I view it. Both mortgages were the voluntary acts of Mrs. Stone and her husband, not given to reward diligent creditors, but made voluntarily, with the intention of evading the statute forbidding preferences in a deed of assignment, without the presence or participation of the preferred creditors.

A decree will be entered in accordance with this opinion, decreeing the two chattel mortgages void as to the creditors of Mrs. Stone; that the assignee be enjoined from paying anything from the proceeds of the assigned assets on the said mortgages, or either of them; and that, after paying the costs and expenses of executing his trust, he pay the proceeds *pro rata* upon the debts proved against Mrs. Stone, according to their respective rights, under the statute in such case provided, including the debts of Root & Co. and Darius Stone with the debts of other creditors.

There were several questions raised as to the jurisdiction of the court; but they are all overruled. Mrs. Stone is not a necessary party; the assignee can contest every question that she could. The debt or claim of the complainants has been sufficiently established in this suit, in which there has been ample opportunity to contest it, and it was the duty of the assignee, if there was any defense, to make it. The bill of complaint is not a creditor's bill, but a bill to enforce the trust created by the deed of assignment, among other things, and to have preferences declared void; and this is clearly the right of complainants, within the paragraph 8744 of Howell's Statutes before alluded to. They may bring their suit in this or in the state court, being non-residents.

Ex parte KOEHLER, Receiver, etc.

(Circuit Court, D. Oregon. May 4, 1885.)

1. CORPORATION ACT—VESTED RIGHT THEREUNDER CANNOT BE IMPAIRED OR DESTROYED BY THE LEGISLATURE.

The power of the legislature to alter or repeal the general incorporation act of Oregon is qualified so that it cannot thereby "impair or destroy any vested corporate right."

2. RIGHT TO A REASONABLE COMPENSATION.

A railway corporation formed under the general incorporation act of Oregon has a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road, which the legislature cannot impair or destroy.

3. LEGISLATURE MAY PRESCRIBE RATES OF TRANSPORTATION.

The legislature may prescribe rates of transportation, and the same will be presumed to be reasonable until the contrary is shown, but the judiciary are the final judges of what is reasonable, or what "impairs" the vested right of the corporation to a reasonable compensation for its services.

4. DISCRIMINATION BY RAILWAY CORPORATIONS.

The legislature may prohibit any discrimination by a railway corporation between persons or places, unless the same is done to enable it to retain or secure business at a point or place where there are competing lines of transportation, and in such case it may charge less for a long haul than a short one in the same direction, so long as the charge for the latter is reasonable.

Petition for Instructions.

John W. Whalley, for petitioner.

DEADY, J. On January 19, 1885, Mr. Richard Koehler was appointed receiver by this court, in the suit of *Harrison et al. v. The Oregon & California Railway Company et al.*, of the road of said company, comprising upwards of 400 miles of track, leading from Portland, via the east side of the Wallamet river, to Ashland, near the southern boundary of this state, with a branch from Albany to Lebanon, and from Portland, via the west side of said river, to Corvallis. On February 20, 1885, the legislative assembly of the state of Oregon passed an act entitled "An act to regulate the transportation of passengers and freight by railroad corporations," which will take effect, by operation of the constitution, on May 21st. On April 23d the receiver presented a petition to this court, asking for instructions concerning his duty in the management of said property in certain particulars covered or affected by said act, which he says he is advised by his counsel is unconstitutional and void. The act is very verbose, and unskillfully drawn, but, so far as it relates to the matters about which the receiver seeks direction, it may be briefly stated as follows:

(1) The fare for the transportation of passengers shall in no case exceed four cents a mile. (2) All charges for transporting property shall be reasonable; but the rate charged on January 1, 1885, by any corporation shall be its maximum rate. (3) No "greater or less" compensation shall be charged one person than another "for like and contemporaneous service" in transporting property. (4) No rebate or drawback shall be allowed in any case, except when property is shipped for points beyond the limits of the state. (5) Pooling freight or dividing the earnings of "different and competing" railways is prohibited. (6) No greater rate shall be charged for carrying similar property a short haul than a long one, in the same direction. Any person who violates any provision of the act is made liable to the person injured in treble damages, and a fine of \$1,000.

So far as the act undertakes to fix the charges for carrying passengers and freight it is claimed to be void, on the ground that it impairs the obligation of the contract of the state with the corporation, to the effect that the latter might prescribe and fix its own tolls and charges, contrary to section 10 of article 1 of the national constitution. By section 2 of article 9 of the constitution of Oregon it is provided that

"corporations may be formed under general laws. * * * All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate right." The Oregon & California Railway Company was formed under the general corporation act passed pursuant to this constitutional provision on October 14, 1862, which act contains the following section:

"Sec. 36. Every corporation formed under this act for the construction of a railway, as to such road, shall be deemed a common carrier, and shall have power to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe." Laws Or. 532.

In *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.* 8 Sawy. 614, S. C. 15 FED. REP. 561, this court held that this section only authorized the corporation to charge a reasonable compensation for the transportation of persons and property; but that so far it constituted a contract between the state and the corporation, the obligation of which it could not impair by any subsequent legislation. This conclusion, of course, implies that the right or franchise of the corporation to demand and have a reasonable compensation for the carriage of persons and property is a "vested" one, within the meaning of the constitution of the state, and therefore cannot be impaired or destroyed by the legislature under the power to alter, amend, or repeal the general corporation act.

But it is admitted that the right of the corporation to fix its rates and fares is not absolute, and that, if necessary, the legislature may limit the same to what is reasonable. Nor, in my judgment, is the power of the legislature over the subject absolute. It cannot require the corporation to accept less than a reasonable compensation for its services. And while the presumption may be, and doubtless is, that any rate which the legislature may prescribe is a reasonable one, such presumption is not conclusive, and may be overcome by evidence to the contrary in any case when the question arises before the courts.

I am aware that in what are called the "*Granger Cases*," 94 U. S. 155-187, it was practically held that the action of the legislature in fixing the maximum rate of compensation for certain railways was conclusive of the question, and could only be reviewed or reversed at the polls. But in none of these cases, as I read them, was the power of alteration or repeal reserved to the state, qualified as in Oregon, so that it could not be used "to impair or destroy any vested corporate right." And the contention of the corporations in those cases was that, although the state had reserved to itself the right of repeal without qualification, still the court ought in justice and right to so limit its operation as not to allow it to interfere with vested rights, as was suggested by Mr. Chief Justice SHAW, in *Com. v. Essex Co.* 13 Gray, 239. But the court refused to do so, and held in effect that, under the unqualified power of appeal reserved to the state, the legislature might deal with the subject as it pleased, even if it deprived the corporation of all right to compensation for services in the future, and

there was no appeal from its action except to the polls; and that, if the business and property of the shareholders was thereby destroyed or rendered valueless, they must blame themselves for engaging in a corporate enterprise under such precarious conditions.

Admitting, then, that the legislative assembly has the power to prescribe a maximum rate for the carriage of persons and property, and that such rate is presumed to be reasonable until the contrary is shown, I proceed briefly to consider the matters concerning which the receiver desires instruction.

And first as to the provision fixing the rates for carrying passengers: There is no sufficient showing that the rate prescribed is not reasonable. The only distinct allegation in the petition to the contrary is that "the actual cost" of carrying "passengers on many portions of the road is in excess of the maximum rates allowed" therefor; but what the effect is upon the receipts for passenger traffic on the road, as a whole, does not appear, and probably cannot be definitely ascertained except by experience. It is commonly understood that now, and prior to the passage of the act, the fare between Portland and Albany, Lebanon and Corvallis, was four and one-half cents a mile; between Albany and Roseburg, six cents; and between Roseburg and Ashland, seven cents; and on mileage tickets between Portland and Oregon City, two cents a mile; between Portland and Albany and Lebanon, three cents; and all other points, four cents a mile.

Owing to the increased cost of operation and the limited population and travel, it is probably true that a rate which would be reasonable in the Wallamet valley would not pay expenses to the south of it. But if the legislature, in fixing the rate, think proper to make it uniform over the whole line, so as to make the more wealthy and populous portion of the state contribute to the locomotion of the inhabitants of the southern portion thereof, I am not prepared to say it has not the power to do so, or that the corporation can be heard to object thereto, so long, at least, as the compensation received by it for the carriage of passengers over its road, as a whole, is reasonable. While the road remains in the hands of a receiver of this court, it is not desirable that there should be any conflict between its management and the policy of the state, except when the latter is clearly contrary to the legal right and substantial interest of the road. For the present the receiver will be instructed to operate the road in this respect in subordination to the act, and if experience shall prove that the rate is insufficient to yield the road, as a whole, a reasonable compensation, the matter may be further considered.

As to the matter of long and short hauls, the question, although *prima facie* one of discrimination, directly involves the right to a reasonable compensation. I assume that the state has the power to prevent a railway company from discriminating between persons and places for the sake of putting one up or another down, or any other reason than the real exigencies of its business. Such discrimination,

it seems to me, is a wanton injustice, and may therefore be prohibited. It violates the fundamental maxim, which in effect forbids anyone to so use his property as to injure another, *sic utere tuo ut alienum non laedas*. The provisions of the act that I have condensed in paragraphs 3, 4, and 6 aforesaid are intended to prevent this practice. But where the discrimination is between places only, and is the result of competition with other lines or means of transportation, the case, I think, is different. For instance, the act prescribes a reasonable rate for carrying freight between Corvallis and Portland, or from either to points intermediate thereto. But Corvallis is on the river, and has the advantage of water transportation for some months in the year. The carriage of goods by water usually costs less than by land, and as water-craft are allowed to carry at a rate less than the maximum fixed for the railway, they will get all the freight from this point unless the latter is allowed to compete for it. But if, to do this, it must adopt the water rate for all the points intermediate between Portland and Corvallis, where there is no such competition, it is, in effect, required to carry freight to and from such points at a less rate than that which the legislature has declared to be reasonable, or else give up the business at Corvallis altogether. And the same result would follow as to Salem and other points on the east and west side lines, where there is convenient access to water transportation.

If the legislature cannot require a railway corporation, formed under the laws of the state, to carry freight for nothing, or at any less rate than a reasonable one, then it necessarily follows that this provision of the act cannot be enforced so far as to prevent the railway from competing with the water-craft at Corvallis and other similarly situated points, even if in so doing they are compelled to charge less for a long haul than a short one in the same direction. It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly for the purpose of putting the one place up or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the legislature has declared to be a reasonable rate, or abandon the field, and let its road go to rust. Nor can the shipper at the non-competing point, or over the short haul complain, so long as his goods are carried at a reasonable rate. It is not the fault of the railway that the shipper who does business at a competing point has the advantage of him. It is a natural advantage which he must submit to, unless the legislature will undertake to equalize the matter by prohibiting the carriage of goods by water for a less rate than by rail; and when this is done, the inequalities of distance as well as place may also be overcome by requiring goods to pay the same rate over a short haul as a long one,

and then the shipper at Ashland will be as near the market as any one.

As to the interchange of freights with the Oregonian Railway Company, the case stated in the petition does not seem to be one of pooling freights or dividing earnings, but rather a case of a long haul at a less rate than a short one in the same direction, to meet the contingency of river competition at Ray's or Fulquartz's landing. Pooling freights or dividing earnings is resorted to by rival and competing lines of railway as a means of avoiding the cutting of rates, which, if persisted in, must result in corporate suicide. It is not apparent how a division of the earnings of two such roads can concern or affect the public, so long as the rate of transportation on them is reasonable. But assuming, what is not admitted, that the legislature has the power to prohibit the practice, the Oregon & California and the Oregonian railways do not appear to be competing ones, but rather supporting ones,—the latter serving as a feeder, branch, or continuation of the former. Nor is the arrangement between them a pooling one, but simply one by which each carries for the other at a fixed price, per ton per mile. There is nothing in the arrangement which prevents the receiver from doing a "like service" for any one else on the same terms, and I have no doubt he would be glad to. The receiver is instructed:

(1) To carry passengers at a rate not exceeding four cents a mile on any portion of the road, and for as much less on the whole or any part thereof as he may think advisable; (2) to charge no more for the carriage of goods than the maximum allowed by the act, nor no more for a short haul than a long one in the same direction, except to and from points where the rate obtainable is affected by water transportation, in which case he may carry at as low a rate as the water-craft do, without reference to the length of the haul; (3) to continue the interchange of freight with the Oregonian railway on the footing of the present arrangement as long as he may think advisable; and (4) in the discharge of his duties, to otherwise obey and conform to the provisions of the act.

The foregoing contains my present impression of the rights and duties of the receiver in the premises. But being *ex parte*, of course, it is given subject to further consideration and correction. The receiver is instructed to obey the act for the time being, except in the case of a long haul to or from a point affected by water transportation. If any one considers himself aggrieved by the action of the receiver in this particular, on application to this court leave will be given to bring an action herein against him for damages, so that the matter may be regularly and formally heard and determined.

As the question involved—"has the corporation a contract with the state for the right to demand and have a reasonable compensation for the carriage of goods?"—is a federal one, it is proper that the action should be brought in this court.

SINTON v. CARTER Co.¹*(Circuit Court, D. Kentucky. January 24, 1885.)*

1. CONSTITUTIONAL LAW—LEGISLATIVE POWERS—MUNICIPAL CORPORATIONS.

In the absence of any constitutional prohibition the corporate existence and powers of municipalities are subject to the legislative control of the states creating them.

2. SAME—BY WHAT AGENCY MUNICIPALITY MAY ACT.

Where there is no constitutional inhibition, the legislature of a state may properly authorize a county to create a debt for a governmental purpose without a submission to a vote of the people, and may, in its discretion, select the agency by which the county is to act.

3. SAME—CASE STATED.

Where Carter county had lawfully issued its bonds in aid of a railroad, and portions of its territory had been taken to form other counties, by acts which provided that the citizens and property within the old limits should remain liable to taxation for the payment of those bonds, "as though this act had never been passed;" *held*, that an act which authorized the Carter county court to compromise those bonds, to issue new obligations in settlement, and to levy and collect taxes upon all the territory originally bound, was constitutional.

4. OBLIGATIONS.

The word "obligations," used without limitation, includes coupon bonds payable to bearer.

At Law. On demurrer.

John W. Stevenson, Wm. Gobel, and E. B. Wilhoit, for plaintiff.

A. Duvall, for defendant.

BARR, J. The defendant demurs to the petition because, as is argued, (1) the act under which the bonds sued on were issued is unconstitutional and void; (2) the act, if constitutional, does not authorize the issuing of these bonds; (3) there is a defect of parties defendant. It is insisted that the title of the act under which these bonds were issued does not express its subject, but is misleading and delusive. The title of the act of 1878 (1 Sess. Acts 1878, p. 77) is: "An act authorizing the county of Carter, and those parts of Boyd and Elliott taken from Carter county, to compromise and settle with the holders of the bonds and coupons of interest executed by Carter county in its subscription to the capital stock of the Lexington & Big Sandy Railroad Company, and to levy and collect a tax for that purpose." An examination of the act will show that the subject-matter is distinctly expressed by this title. But it is claimed that the legislature had no constitutional authority to authorize the county court of Carter to compromise an old debt and issue bonds for parts of Boyd and Elliott counties, and to levy and collect taxes upon parts of those counties to pay their proportion of those bonds thus issued. If this be true, as contended, the act would not be unconstitutional by reason of its title. The constitutional provision is that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title." Here there is only one subject, and that is clearly expressed in the title. We have seen no case

¹Affirmed. See 7 Sup. Ct. Rep. 650.

which sustains the contention of the learned counsel, and we think none can be found. Cooley, Const. Lim. 144-148, and authorities referred to in notes.

The next inquiry is whether the legislature had the constitutional right to empower the county court of Carter to act and bind those parts of Boyd and Elliott counties which had been a part of Carter county. Carter county, under the authority of the legislature, and prior to the formation of Boyd and Elliott counties, subscribed \$75,000 to the stock of the Lexington & Big Sandy Railroad Company, and paid for it by the issuance of its coupon bonds payable to bearer. In 1859, and with these bonds outstanding, the county of Boyd was created. Sess. Acts 1859-60, p. 34. In this act the legislature provided "that nothing in this act shall be construed to release the citizens and property, now subject or which may hereafter become subject to taxation, within the boundary of Carter county, included in the first section of this act, from being held and made liable for the bonds and interest issued to the Lexington & Big Sandy Company, as though this act had never been passed." The county of Elliott was created by an act of the legislature passed in 1869, and exactly the same language is used in regard to this subject as that used in the act of 1859 creating Boyd county. Sess. Acts 1869-70, p. 72, § 7. In addition to this, express authority was given the officers of Carter county to continue to levy and collect taxes in that part of Elliott which was taken off of Carter county. This part of the act was, however, subsequently repealed. The effect of these provisions in the acts creating the counties of Boyd and Elliott was, I think, to retain those parts of Carter county within that municipality, as far as the then outstanding bonds were concerned. No other construction of these provisions would give full effect to the words, "as though this act had never been passed."

If the acts creating Boyd and Elliott counties had never been passed, there could not have been a doubt of the right of the legislature to authorize the county court of Carter to compromise and adjust the outstanding debt, and issue new bonds binding the county for the amounts agreed upon in the compromise. This would not have been because the people of the county had elected the county court as their final agent, but because the legislative department of the state authorized a subsisting municipality to compromise and adjust its outstanding bonds, and authorized the county court, as the agent of this municipality, to act for the corporation. It might, in the legislative discretion, have indicated any other agent. If I am correct in the conclusion that for the purpose of this outstanding debt of Carter county the territorial limits were the same as before the establishment of Boyd and Elliott counties, then the agency which should act for the county was within legislative discretion.

The question is not whether the legislature has the constitutional authority to empower a county court of one county to subscribe stock

in a railroad company, and issue bonds in payment thereof, for another county, without the consent of the people of that county, but whether, when the debt has already been created by the county itself under the authority of law, the legislature may not, in its discretion, indicate the agency to represent the debtor municipality in compromising and adjusting the debt, and issuing new bonds in settlement, without the consent of the people of that municipality. It is true that the act of 1878 authorized the novation of the old debt, and the creation of a new one for the amount of the compromise, and that the petition alleges the bonds sued on were delivered and accepted as the result of that compromise; but this fact did not make the act unconstitutional, for the reason indicated.

Allison v. Louisville, H. C. & W. Ry. Co. 10 Bush, 1, rather sustains than conflicts with the conclusion indicated. In that case the court sustained a subscription to the railroad company, and the issuing of bonds of one precinct of a county by the county court of the county. This precinct was only a small portion of the county, and the county court was in no proper sense the representative of the precinct. It was, in reality, an agency indicated by the legislature, and not selected by the people of the precinct. The court therefore, in that case, sustained the constitutional authority of the legislature to authorize this county court to act as the agent of the precinct, and for it to issue and deliver their bonds without asking the consent of the people of the precinct. See, also, *County Judge Shelby Co. v. Shelby R. Co.* 5 Bush, 225; *Bracken Co. Ct. v. Robertson Co. Ct.* 6 Bush, 70.

In the absence of a constitutional inhibition, the legislature of a state may, in its discretion, indicate the mode and the agency by which a debt is created by a city, town, county, or precinct in a county. The debt must be created for a governmental purpose, but if for such a purpose, there can be no necessity for a submission to a vote of the people of the city, town, or county, or other municipality. *Railroad Co. v. Otoe*, 16 Wall. 667; *Town of Queensbury v. Culver*, 19 Wall. 83; *County of Callaway v. Foster*, 93 U. S. 567; *Mount Pleasant v. Beckwith*, 100 U. S. 514.

In the case at bar the original debt had been created for a recognized public and governmental purpose, and the mode and an agency for an adjustment and settlement was indicated by the legislature, and this agency, representing the municipality, has compromised and settled the debt by giving new obligations for much less than the amount of the outstanding debt. The fact that the new obligations were for much less than the original debt makes no difference in the constitutional question, however.

It is insisted that if the act of 1878 be constitutional, still, it does not authorize the issuance of the bonds sued on, which are coupon bonds, payable in Cincinnati, Ohio, to the holders of the original bonds or bearer; and they are *ultra vires*. The act authorized the county court of Carter county to compromise and settle with the holders of the out-

standing coupon bonds. These bonds were payable out of the state and to bearer, and the county court was empowered to execute to the holders of said bonds and coupons, severally, the obligations of said county of Carter, and those parts of the counties of Boyd and Elliott as had been a part of Carter. The act provided that "said obligations shall contain such stipulations as to interest as may be agreed upon by the court and holders of said bonds, but not at a greater rate than six per centum per annum, payable semi-annually. Said obligations shall be due and payable at such times and be for such amounts as may be agreed upon by the court and the holder or holders of said bonds and coupons." The authority is to execute to the holders of the outstanding bonds and coupons new obligations, due and payable at such times and for such amounts as might be agreed upon by the court and the holders of the outstanding bonds, bearing a semi-annual interest at a rate to be agreed upon, not exceeding 6 per centum per annum.

It is insisted that "obligations," as used in this act, excludes the authority to issue a coupon bond payable to the holder of the old bonds and *bearer*, and only authorizes the county court to issue an ordinary promissory note, non-negotiable, and payable to the holder of the old bonds only. Obligations is a generic word, and includes all kinds of contracts by which contracting parties bind themselves, and, in the absence of limiting words, or the connection in which it is used, will be construed in its generic sense.

I perceive nothing in the provisions of this act or the surrounding circumstances which indicates that the legislature intended to limit the obligations to be executed to the county's non-negotiable note. The act does not indicate the place of payment, or limit it to this state. It, in express terms, gives the county court authority to execute the obligations, payable at such *times* and for such amounts as might be agreed upon, and provide that the obligations should bear semi-annual interest. The various provisions of the act itself show that it was not expected or intended the county court would compromise and settle a large debt, and pay the whole of it immediately, or within a short time by taxation. The evident purpose of the act was to compromise and refund this debt, or a very large part of it. The word "obligations" was probably used because of its broad meaning, and it included coupon bonds as well as promissory notes, or a mere acknowledgment of indebtedness. In adjusting this outstanding debt, it might be useful to have the right to execute various kinds of obligations, but, however that may have been, I think there is nothing to limit the meaning of "obligations" to mere acknowledgment of indebtedness or non-negotiable notes.

The suggestion of the learned counsel, that the authority given in this act to execute the obligations to the holders of the outstanding bonds *severally* limits the meaning of obligations, is not sustainable. If the word was used for any especial purpose, it was more likely to

indicate the legislative authority for the county court to compromise with any of the holders of the outstanding debts, and that the authority to compromise and issue new bonds was not conditioned upon all holders accepting the compromise. The authority to execute coupon bonds is express, and there is no occasion to imply any authority which was exercised by the Carter county court, unless it be for making them payable to *bearer*. The express authority is "to execute to the holder," and under this authority the bonds were executed to the holders of the outstanding bonds, *and bearer*. If these bonds had been executed payable to the order of the holders of the outstanding bonds compromised, they would have been within the express authority given. Why is not "payable to the holder and *bearer*" equally within the authority given? But, waiving this view, I think that as the county court of Carter had authority to execute and deliver "obligations," which included coupon bonds, that, in the absence of any limitation as to the character of these obligations, that court had a right to make them payable in the usual way, and that is to *bearer* as well as to the holder of the outstanding bonds.

The case of *Supervisors v. Galbraith*, decided by the supreme court, (99 U. S. 216,) is a much stronger case than the one at bar, and settles this question in favor of the plaintiff. There, the Mississippi legislature authorized the supervisors of Calhoun county to issue bonds in aid of a railroad company, and directed that the bonds be payable to the "president and directors of the Granada, Houston & Easton Railroad Company, and *their successors and assigns*." "The bonds were made payable to the Granada, Houston & Easton Railroad Company, or *bearer*." This was claimed to be a fatal defect, but the supreme court held the bonds valid.

There is no defect of parties, for the reason indicated, and for the further reason that if the county courts of Boyd and Elliott might be sued, there is nothing which compels the plaintiff to sue them.

The demurrer to the petition should be overruled; and it is so ordered.

STATE OF MISSOURI *ex rel.* BALTIMORE & O. TELEGRAPH CO. v. BELL TELEPHONE CO.¹

(Circuit Court, E. D. Missouri. March 31, 1885.)

RIGHT OF TELEGRAPH COMPANY TO CONNECTION WITH TELEPHONE COMPANY—PATENTS—LICENSER AND LICENSEE—MANDAMUS—PARTIES.

A., a Massachusetts corporation, and the owner of a patent on a telephone, licensed B., a Missouri corporation, to do the telephone business of St. Louis, upon condition that B. should not establish telephonic connection with any telegraph company unless especially authorized by A. A. permitted B. to establish telephonic connection with the Western Union Telegraph Company. Thereafter the Baltimore & Ohio Telegraph Company applied for a *mandamus* to compel B. to permit telephonic communication between it and the petitioner.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

A. was not made a party. *Held*, (1) that A. was not a necessary party; (2) that all other telegraph companies were entitled to the same privilege granted the W. U. Co. upon paying the same price; and that the petitioner was entitled to the relief asked. TREAT, J., dissenting.

Application for a *Mandamus*.

Garland Pollard, for petitioner.

E. T. Allen, for defendant.

BREWER, J., (*orally*.) In this case, I regret to say that my brother TREAT and myself do not agree fully as to the rights of the parties. It is an application on the part of the Baltimore & Ohio Telegraph Company to compel the Bell Telephone Company of Missouri—the company having the telephone business of this city—to permit telephonic communication between it and the petitioner, the Baltimore & Ohio Telegraph Company. The defendant answers that it is engaged in the telephonic business here by virtue of a license obtained from the American Bell Telephone Company, a Massachusetts corporation; that by the terms of the license under which it does business, it may not establish telephonic connection with any telegraph company, other than that permitted by the licensor,—the holder of the patent,—the Massachusetts company; and it further appears that such licensor has permitted telephonic communication with the Western Union Telegraph Company.

Now, the question is whether the court can compel this defendant, doing the telephonic business of this city, to establish communication with any other individual, or company, than that permitted by its license from the patentee. I believe fully in the sacredness of property; but I think all property stands upon an equal basis, whether that property consists of gold dollars in your pocket, real estate, or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I perhaps may, for lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws which control commercial transactions; just as in the warehouse cases, (*Munn v. State of Illinois*, decided by the supreme court of the United States, and reported in 94 U. S. 113,) in which that court held that when an individual built a warehouse, and put his property into that kind of business, he subjected the property thus placed to the laws which controlled the transactions of commerce, involved in which was the power of the public, through the legislature, to regulate rates. No man holding property was bound to build a warehouse, or bound to put his property into that particular channel, but the moment he did so, he put it where the legislature could say, "You may charge so much, and no more, for the transaction of this business." He put his property into the channels of commerce,—as mul-

titudes are doing,—into the railroad business, into the express business, and into other channels of commerce. Whenever the property is put into those channels, it is put within the power of the public, speaking through its legislature, or the power of the court enunciating general rules operative upon such transactions, to modify leases, modify licenses, control duties. So, notwithstanding this licenser has given to the licensee the right to establish a telephonic system in the city of St. Louis, with telephonic communication with only certain prescribed telegraph systems, the moment it permitted the establishment of a telephonic system here, that moment it put such telephonic system within the control of the state of Missouri, and the control of the courts, enforcing the obligations of a common carrier.

A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, "my license is to establish a telephonic system open to the doctors and the merchants, but shutting out you gentlemen of the bar." The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service.

So, my conclusion is that, notwithstanding the terms of this license, which seem to inhibit it from dealing or giving its telephonic privileges to any other telegraph company than the Western Union, the moment it established its telephonic system here, that moment it compelled itself to respond to the demands of any telegraph company or any individual in the city tendering to it equal pay for equal privileges.

The application for *mandamus* will be sustained.

Mr. Brother TREAT differs, however, from me, and may desire to express his difference of views.

TREAT, J., (*orally*.) This is an application, it must be borne in mind, against the licensee, who has a license only in accordance with the terms thereof, and we are asked to *mandamus* that licensee to do what he has no authority to do under the terms of his license. I know of no power in a court which can change a contract between the licenser and the licensee, and give him a contract other than what he has made, either by enlargement or diminution. If this application had been made against the American Bell Telephone Company, which holds the patent,—the patentee,—it would have been a very different question, and the views suggested by my brother judge would then come up for consideration. But how is it that this licensee, who has only a restricted privilege, can by a *mandamus* of this court be ordered to do what under his contracts he cannot do? Can we make

a new contract? Now, so far as the American Bell Telephone Company is concerned, which holds the patent, it reserved for itself the right with respect to telegraphic connections; and it is alleged in this petition that it has granted that to one company. Now, if the American Bell Telephone Company was here, as between it and this party petitioner, the question presented by my brother judge would have arisen, and in that, possibly, we might not have differed at all.

This matter is not a new one in the courts. In the noted case in Ohio the court proceeded not as in this case, because there were two parties defendant or respondents, to-wit: the American Bell Telephone Company, that had all these rights, with which it had not parted; also the local company, and the charter of the state in connection therewith. There is no such case here. A like case to this was reviewed very elaborately by the Connecticut supreme court, (I think in 49 Conn.,) where precisely the views I am expressing were entertained, and they seemed to me a demonstration, and express much more clearly and forcibly than I can do in this summary manner, the true doctrine arising out of the sanctity of contracts. If this party wishes the American Bell Telephone Company to grant equal privileges to it with another telegraph company, let it pursue it,—make it do what it is asked,—but I cannot see, by any true theory of the law, why this local party is to have its rights enlarged, and its duties correspondingly enlarged, in violation of the contract under which it rests.

There may be many reasons, of course, no judicial notice of them being taken, why this restriction was made, to-wit: Here is a telephonic system in St. Louis. Each one of you present here may wish, under the terms stated, to have such telephonic connection. It is stated in the license, which is a contract, that no one of you shall use that for the purposes of taking tolls thereon. In other words, if I have a telephonic connection in my house, and I pay whatever the figure is for it, I am not to open a general telephonic system there, and let the whole neighborhood come in and use my telephone, and pay me therefor, and thus destroy the telephone company's income. It is a personal right, restricted to the use of the individual and his immediate needs. When you bring a telegraph company into operation in connection with it, what would happen? At the telegraph stations here probably there are thousands of messages coming in every day. It is receiving for these telegrams a given amount of money, and taking its tolls thereon. Further than that, instead of doing as heretofore, employing its messengers to do this work, we are asked to compel this telephone company to do that messenger work for it, as an individual would do in permitting his telephone to be used 400 to 500 times a day,—it may be for general purposes,—and the whole telegraphic business of the country poured on this telephonic system and done at a low figure. That, I suppose, was one of the reasons why this restriction was put there.

But suffice it to say, in my judgment there is no authority, for courts to compel a man to do what he has no right to do, and force him to violate his contract. He stands on his contract as he has made it, and there ends his duties, obligations, and rights, and courts cannot cause him to violate it. That is my view of the case. Parties must pursue the American Bell Telephone Company if they wish this question to be presented. It cannot arise in this way.

BREWER, J., (*orally.*) I may be pardoned for suggesting, and I do it with great deference, because as you all know, gentlemen, I share with all the members of the bar in this district in a profound admiration for my brother TREAT, but there are two things which seem to me to make against his argument very strongly. I agree with him that if this telephonic system had refused a telephonic connection with any telegraph company, that the Baltimore & Ohio Telegraph Company could not insist upon such connection, but when it has established a telephonic connection with one telegraph company, I think every other telegraph company has equal right; on the same principle that if it established a telephonic connection with one lawyer, it could not refuse telephonic connection with another lawyer; and the further practical question, that while there may be a contract between the licensor and the licensee, the licensor is not a citizen—an inhabitant—of or found within this district. Suppose this petitioner went to Massachusetts, and obtained a decree there binding the licensor; that would not bind the licensee; that would not disturb the contract, so far as the licensee is concerned. Would the court in Massachusetts have entertained a suit seeking to establish a naked legal right, and without practical benefit to any one? The licensee does not live in Massachusetts. The licensor does not live in St. Louis. Practically, of what avail would a decree be against a licensor in Massachusetts? Would it bind the licensee here? Haven't you got, in a last resort,—a last analysis for practical results,—to come right to the licensor, the holder, the proprietor of the telephonic system here?

TREAT, J., (*orally.*) You omit one consideration, (and I may say we are not going into a discussion of the question on the bench,) but it so happens that the licensor, by the very terms of his license, is the only party to make connection. He has done it, and the licensee has nothing to do with it. If you compel the licensor, in whom alone is reserved this privilege, to equalize the matter, he does it; it is immaterial whether the licensee agrees with whatever the licensor says shall be done. Hence the licensee wouldn't be a necessary party anywhere.

BREWER, J., (*orally.*) This question will be settled finally by the supreme court.

Mr. E. T. Allen. I will ask, in view of what has been expressed by the court, whether it wouldn't be proper that your honors should make up a certificate of a difference of opinion, in order that there may be no difficulty in regard to the amount that is involved?

TREAT, J. An affidavit will settle that.

BREWER, J. I do not think it would avail particularly, unless, as I gathered from what Justice MILLER said to me last fall, that the supreme court looks a little more kindly on a case where there is a certificate of division in respect to a motion for advancement. As far as the mere question of amount is concerned, I think that can be settled without difficulty.

TREAT, J. That has been settled, Mr. Allen, repeatedly. In looking for something else, I found repeated decisions on the point, but there is no dispute as to the practice. An affidavit as to values will be sufficient.

Mr. Allen. This is a very important question, and it has been, as your honors have observed, passed upon quite differently in two courts of last resort in the states of Connecticut and Ohio, and it is very desirable that it should be speedily passed upon in the supreme court.

TREAT, J. All you can do is to make an affidavit, and let it go with the papers, stating that the amount involved is over \$5,000. It involved your system, and I suppose you can state that conscientiously. You can take it to the supreme court at once, and we will note there is a division of opinion, so that it can be advanced.

BREWER, J. Anything that the court can do to further the advance of the case there, it will gladly do.

*In re DOOLITTLE and another, Strikers.*¹

(Circuit Court, E. D. Missouri. March 18, 1885.)

1. RECEIVERS—INTERFERENCE WITH PROPERTY BY STRIKERS—CONTEMPT.

Where the employes of a railroad company, whose property is not in the custody of this court, by concert of action quit work and take possession of and obstruct the movement of engines and cars on the tracks of said company, and while so doing also take possession of or obstruct the operation of engines or cars in the custody of receivers of this court, it is the right and duty of the court to punish such latter acts as contempts of its authority.

2. SAME—DISTINCTION BETWEEN LAWFUL AND UNLAWFUL PURPOSE OF PARTIES INTERFERING.

If a party engaged in a lawful undertaking unintentionally interferes with or obstructs the officers of this court in the discharge of their duties, the court is not tenacious of its prerogative; but it is otherwise where parties, while engaged in an unlawful act, obstruct the officers of this court, although intending no contempt.

¹ Reported by Edwin G. Merriam, Esq., of the St. Louis bar.

3. SAME—DUTY OF STRIKERS TO APPLY TO COURT.

This court is open to hear any just ground of complaint against its receive s. Employes of the receivers may present their grievances, and the court will instruct its officers in the premises. For this reason the court will be prompt to punish men who interfere with its receivers in the custody and control of property committed to them by law.

4. SAME—INTIMIDATION OF EMPLOYES BY STRIKERS—"REQUESTS" EQUIVALENT TO THREATS.

A simple "request" to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct employes in the performance of their duties, is not less obnoxious than the use of physical force for the same purpose. A "request" under such circumstances is a direct threat and an intimidation, and will be punished as such.

In the Matter of the Order on Edward Doolittle and William Schanbacher to show cause why they should not be punished for contempt in interfering with property in the hands of the receivers of this court.

The marshal reported to the court that at Hannibal, Missouri, he found the possession and use of property in the custody of the receivers of the Wabash, St. Louis & Pacific Railway, heretofore appointed by this court, interfered with by bodies of men, who prevented the agents and employes of said receivers from operating portions of said property by spiking and blocking the tracks, drawing water from engines, inciting the agents and employes of the receivers to quit work, and threatening them with violence if they continued in the service of the receivers; that he gave warning that all persons interfering with property in the custody of this court would be arrested and punished. He further reported that, in particular, one Edward Doolittle had, on the tenth day of March, 1885, prevented James W. Ritchie, a train-master of the said Wabash Railway, from taking out of a round-house a number of engines in the custody of the receivers, although notified that these engines belonged to the Wabash Railway. Doolittle was reported to be a recognized leader of persons engaged in the unlawful acts as above stated. The marshal accordingly caused him to be arrested. And, further, that on the twelfth day of March he arrested one John Schanbacher for holding an engine upon and for the purpose of blocking the main track over which Wabash trains are run into the city of Hannibal. Schanbacher was previously warned that he was interfering with property in the custody of this court, but he disregarded the warning, and interposed his person between the marshal and the engine, saying he would not let the engine go down the road; whereupon the arrest was made. Schanbacher was also alleged to be an active leader of the "strike" then in progress.

The report of the marshal as to the acts of Doolittle was supported by the affidavit of James W. Ritchie, a train-master of the Wabash Railway, as before stated, which affidavit showed that the engines and freight cars of the Wabash Railway, the movement of which Doolittle obstructed, were at the time in the yards of the Missouri Pacific Railway Company, certain of whose employes it seems were then engaged in a "strike." The affiant stated:

"I said to him, [Doolittle,] 'I understand that you object to my moving these engines and this freight. How is this, when your friends and associates have consented?' He replied: 'We have a point to make on this.' I told him to make his point where it belonged, and not on us. I told him this was Wabash freight, and the Wabash had nothing to do with this strike in any shape or form. He replied they were good ornaments. I asked him to get into a car and talk this matter over with me, and he said it was too rich for his blood; and I then asked him to walk down the track with me, and he said he had not time."

The result was that the movement of the 9 Wabash engines and about 100 cars of freight was delayed some hours. The prisoners, Doolittle and Schanbacher, were accordingly ordered to show cause why they should not be attached and punished for contempt of court, for their interference with property in the possession of the receivers. They filed a reply in writing, alleging that they had not at any time been knowingly or willfully in contempt of this court or its officers, or intentionally obstructive of the decrees, orders, or process of the court; but, on the contrary, had intended to regard and obey the orders of the court so far as they knew or understood them. As to the detention of the nine engines in the Hannibal yards, they alleged that the train-master of the Wabash Railway "cordially" agreed to a delay of several hours, until Doolittle could obtain advice by telegraph from "our headquarters" at Sedalia. Also, that there being a difference of opinion as to which railroad the freight belonged to, it was "harmoniously settled" between the train-master and the strikers that it should be left where it was; that no violence, intimidation, or threats were used towards the engineers, or any one else, but that the engineers were unwilling to go out without the full consent of the strikers; and thus the engineers were detained by the strikers, of whom Doolittle admitted that he was one, and also that he acted as their "spokesman." Doolittle denied that he had participated in spiking the track, drawing water from engines, or that he had any previous knowledge that such acts were contemplated. Schanbacher admitted that he "objected" to the marshal taking the engine to a side track, but alleged that he did so hastily, and without appreciating the marshal's authority, and a moment later called to the engineer to go onto the side track, when some one in the crowd cried out not to do it. In conclusion, both Doolittle and Schanbacher reiterated that they did not at any time use threats or violence against any person, whether marshal or other person. They admitted that their "zeal in the cause" might have led them to commit acts capable of being construed as in contempt of this court, but averred that such contempts were without willfulness, malice, or intent on their part.

Charles C. Allen, for respondents, Doolittle and Schanbacher.

BREWER, J., (*orally*).¹ The facts in reference to this case are very

¹The opinions of Judges BREWER and TREAT as here published were reported by Mr. L. L. Walbridge, stenographer of the court, and copy of same was submitted to the judges for revision previously to this publication.

obvious. It does not appear that these defendants in the first instance started out to obstruct the receivers in their management of the road. In some way they had ascertained that the road was in possession of the receivers appointed by this court, and that it was not prudent to interfere with them. But it is clear that, while engaged in a strike against the Missouri Pacific Railroad, they did interfere with the management of the engine and freight cars under the control of such receivers, and did obstruct such receivers in carrying on the business of the road placed in their charge by this court. Now, while in one sense they cannot be charged with contempt in that they intended to obstruct this court and its officers in the discharge of its and their duty, yet they placed themselves in this attitude: They engaged in an unlawful enterprise, and while so engaged they did interfere with the officers of this court in the management of the road which was in their hands as receivers. Now, if a party engaged in a lawful undertaking unintentionally interferes with some of the officers of this court, and obstructs them in the discharge of their duties, this court is not tenacious of any mere prerogative, and would let such action pass almost without notice; but where parties are engaged in that which is of itself unlawful, in doing that which they have no right to do, and in so doing obstruct the officers of this court, although intending no contempt, that is a very different thing.

Suppose a party of men—and I state this merely as an illustration—combine to commit an assault and battery upon one person, and, without intending so to injure, do, through mistake, actually seize and beat a third person. Although such beating was unintentional, perhaps accidental, yet, as they were engaged in an unlawful enterprise, it is just the same as though they intended that unlawful attack upon the person actually receiving the injury. And so, here, though these defendants did not set out to obstruct the officers of this court, and the receivers of the Wabash Company, in their administration of that property, yet they did set out to obstruct some persons in the exercise of their legal rights; they did set out to do that which they had no right to do; and this court is justified, indeed, it is its duty, inasmuch as they did obstruct the officers of this court, to regard it just the same, or nearly the same, as though they started out to obstruct the officers of this court, the receivers of the Wabash Railway Company.

Mr. Charles C. Allen. Do I understand your honor to say that the act of striking—merely carrying out of the strike—was unlawful?

The Court, (Judge BREWER.) It is not the mere stopping of work themselves, but it is preventing the owners of the road from managing their own engines and running their own cars. That is where the wrong comes in. Anybody has a right to quit work, but in interfering with other persons' working, and preventing the owners of railroad trains from managing those trains as they see fit—there is where the wrong comes in.

I believe Judge DRUMMOND, in a series of cases that came before him, across the river in Illinois, where there was a direct resistance by parties engaged in such a strike, to the receivers appointed by him, sentenced the ringleaders to six months in the county jail. In this case I do not feel as though it would be right to treat them exactly as though they occupied that same position, and yet, as I said before, I do not think it is a matter that can be overlooked. Things of this kind are not to be encouraged or tolerated, and the sentence will be that they shall be confined in the county jail for 60 days, and pay the costs of this attachment.

TREAT, J., (*orally.*) As far as I am concerned, I should have given a severer punishment if the matter had been left solely to me, and I should emphasize the statement very strongly that while no one would admit more readily than the judges of this court the right of every man to determine whether he will engage in this or another employment, and would protect him in that right through any proper judicial proceeding, he must not resort to lawless measures to injure the property or the person of any other party. More particularly is that true with regard to the receivers of courts. If there was any just ground of complaint, so far as the so-called strikers were concerned, this tribunal was open to have them present their matters here, and the court would have instructed the receivers with regard to it; and one of the prominent reasons why courts are so prompt to punish men who interfere with receivers in the custody and control of the property committed to them by law, is the fact that any one engaged in employment under them can have ample redress by applying to the court with respect thereto.

Now, instead of coming to this court to make application, as some other parties have done,—other employes,—they chose to engage in a lawless enterprise whereby were involved, not only the stoppage of commerce, but perhaps a loss of millions of dollars, and merchants and private individuals and all classes were injured by this lawless proceeding. And now the party comes and says, what? Evasively, "I did not know that I was interfering with the officers of this court;" but he did know that he was interfering with property that he had no right to interfere with, and "perchance he overstepped the limit, and involved himself within the jurisdiction of this court." Further, "We did not directly by physical force do sundry and divers things; we merely requested other persons to do it." A specious pretense! The court must be supposed to know, as everybody else does, what the object was; it was the threatening intimidation which lay behind the whole matter, and hence they are within the rule. "A request," under such circumstances, was a threat. The court cannot be blinded by such mere specious language. The fact is there—the positive fact that here was a direct threat and an intimidation. The form of language amounts to nothing. Courts do not stick in the letter; they

look at the fact,—the act itself,—and that was the case here. Parties determined lawlessly to stop the commerce of the country, so far as these roads were concerned, and to do it by force, by threats, and by intimidation; and in doing it they interfered with the property of this company under the charge of the court, and, instead of coming to this court, if they had any wrong to be redressed, and asking the court to adjust their cause, they took the law in their own hands, and they must suffer the consequences of doing it.

Of course I assent, as I must do, to the lenient punishment prescribed by the circuit judge; but if it had been left to me alone, it would have been much severer.

The first point that is to be discussed in connection with the foregoing opinion is that which is embodied in the following statement: "Suppose a party of men—and I state this merely as an illustration—combine to commit an assault and battery upon one person, and, without intending so to injure, do, through mistake, actually seize and beat a third person. Although such beating was unintentional, perhaps accidental, yet, as they were engaged in an unlawful enterprise, it is just the same as though they intended that unlawful attack upon the person actually receiving the injury."

The question which is here put, viewing it in its general relations, is one by which the courts have been frequently embarrassed. It is as old as the earliest opinions of Roman jurists. It comes to us as fresh in the cases of to-day as if it never had before been discussed. Is a man responsible for acts which are incidental to other acts designed by him, but which were, nevertheless, not intended by him? The general rule, I apprehend, may be thus properly stated: When the act in question results as a natural and probable consequence of an intended wrongful act, then the unintended wrong derives its character from the wrong that was intended. So far as concerns questions of general malice this position cannot be disputed. A man, for instance, from general malice, tears a rail off of a railway, or drops from a roof a very heavy substance on the pavement where a crowd is passing; and in such cases, if death ensues, he is responsible for murder, though he did not intend to take any one life in particular. This is also the rule in cases of special malice, when the object effected is incidental to the object intended. The same distinction has been accepted with regard to arson, where it is held that where the house of A. is burned instead of that of B., as the felon intended, this is arson as much as if the intent had been to burn the house of A.¹ In burglary, also, it is held to be no offense that the goods stolen were not those which the burglar intended to steal.² Nor is it a defense to an indictment for stealing that the defendant's intent was not to steal from any particular owner, or that it was to steal from a person who turned out not to be the real owner.³

These conclusions may be sustained on principle. Whatever I ought to regard as incidental to an intended act, I must be regarded as having intended. It is no defense, if I shoot at A. on the road and hit B., who happens to be behind A., that I did not actually see B. in the spot where he was shot. It was my duty to have seen him, and I am responsible for the consequences. It is true, as I have endeavored elsewhere to show,⁴ that the proper way of apportioning the responsibility in such cases is by indicting the offender for shoot-

¹ R. v. Pedley, 2 East, P. C. 1026.

² R. v. Regan, 4 Cox, C. C. 335.

³ R. v. Moore, Leigh & C. 1; 8 Cox, C. C. 416.

⁴ Whart. Crim. Law, § 120.

ing at A. with intent to kill, and also for the negligent homicide of B. But, however this may be, that the offender in such a case is indictable for the injury that he ought to have seen, cannot be questioned.¹

The observations that have just been made are peculiarly applicable to cases of riots arising from the illegal assertion of supposed rights, or redress of supposed grievances. Parties engaging in such a riot are indictable for the natural and probable consequences of the riotous confederacy. If the plan involved a crime, then the offenders are responsible for such crime when committed in execution of the plan.²

The only qualification is that such an act must result from the confederacy. If it does not, the confederates not engaged in it cannot be indicted for its commission.³

The rule is thus well stated by Judge CAMPBELL in *People v. Knapp*:⁴ "There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for any one to do it. In other words, the principle is quite analogous to that of agency, where the liability is measured by the express or implied authority. And the authorities are quite clear, and reasonable, which deny any liability for acts done in escaping, which are not within any joint purpose or combination."⁵ Hence it has been held that when several persons are engaged in committing a felony, and, on being detected, run different ways, upon which one of them, in order to get rid of a pursuer, assaults him, the others are not to be considered as indictable for the offense.⁶

The general rule is that the confederate is not responsible for the crime which is not a probable and natural consequence of the confederacy, unless such crime was committed with his assent. The question whether a party assaulting an officer in ignorance of the latter's official character is indictable for the aggravated offense, is one of greater difficulty. Undoubtedly we have statements made in such cases that if a man intends a wrongful assault, he is indictable for the distinctive offense of assaulting an officer, even though the assault was made in ignorance of the assaulted person's official rank.⁷ But there is something very unreasonable in this. A public officer, whether he be a sheriff, or a constable, or a receiver, appointed by a court having jurisdiction, ought to give notice of his position, if he desire to clothe himself with the immunities of that position, at least so far as concerns a prosecution for an assault on himself personally. It is the official person of the assaulted party that creates the offense in such a case. It is true that if a statute should prescribe "whoever assaults an officer, even without knowing the person assaulted to be an officer, shall be guilty of the aggravated offense," etc., it

¹ See, on this subject, *R. v. Smith*, Dears. C. C. 559; 33 Eng. Law & Eq. 567; *R. v. Jarvis*, 2 Mood. & R. 40; *R. v. Regan*, 4 Cox. C. C. 335; *Callahan v. State*, 21 Ohio St. 306; *Walker v. State*, 8 Ind. 290; *People v. Torres*, 38 Cal. 141. In *Com. v. McLaughlin*, 12 Cush. 615, it was held that when A. shot at B. and C., intending to kill whichever he hit, he might be indicted for an assault with intent to murder both B. and C.

² *Steph. Crim. Law*, 27; *Sissinghurst's Case*, 1 Hale, P. C. 462; *R. v. Manners*, 7 Car. & P. 801; *Com. v. Knapp*, 9 Pick. 496; *Norton v. People*, 8 Cow. 137; *McCarney v. People*, 83 N. Y. 408; *Breese v. State*, 12 Ohio St. 146; *Green v. State*, 13 Mo. 382; *Selvidge v. State*, 30 Tex. 60; *Miller v. State*, 15 Tex. App. 125; *People v. Brown*, 59 Cal. 345. See *State v. Buchanan*, 35 La. Ann. 89.

³ See *R. v. Collison*, 4 Car. & P. 565; *R. v. Howell*, 9 Car. & P. 437.

⁴ 26 Mich. 112.

⁵ See, to the same effect, *R. v. Murphy*, 6 Car. & P. 103; *R. v. Franz*, 2 Fost. & F. 580; *R. v. Horsey*, 3 Fost. & F. 287; *R. v. Skeet*, 4 Fost. & F. 931; *R. v. Hawkins*, 3 Car. & P. 392; *R. v. Tyler*, 8 Car. & P. 616; *R. v. Price*, 8 Cox. C. C. 96; *U. S. v. Jones*, 3 Wash. C. C. 209; *Com. v. Campbell*, 7 Allen, 541; *Watts v. State*, 5 W. Va. 532; *Manier v. State*, 6 Baxt. 595; *Lamb v. People*, 96 Ill. 73; *People v. Knapp*, 26 Mich. 112; *State v. Stalcup*, 1 Ired. Law, 30; *Miller v. State*, 15 Tex. App. 125.

⁶ *R. v. White*, Russ. & R. C. C. 99; *R. v. Skeet*, 4 Fost. & F. 931; *State v. Absence*, 4 Port. 397.

⁷ *U. S. v. Liddle*, 2 Wash. C. C. 205; *U. S. v. Ortega*, 4 Wash. C. C. 531; *U. S. v. Benner*, Bald. 234.

would be no defense that the defendant was ignorant of the officer's official position. But at common law the *scienter* is necessary to constitute the offense, subject to the qualification that a party is supposed to know what he ought to have known. On the other hand, it is no defense to an indictment for obstructing an officer in his duties (*the defendant knowing the officer's official position*) that the object of the defendant was to personally chastise the officer, and not to obstruct him in the discharge of his duties. The obstruction was incidental to the intended assault, and therefore the defendant was indictable for the obstruction.¹

When we come, however, to discuss the question of an attachment for a contempt, a new state of facts is presented. A court of equity is obliged to enforce its decrees; and if those decrees are disobeyed, the only process to compel obedience is by attachment. This is eminently the case with disobedience to an order of specific conveyance,² with disobedience to orders of courts for payment,³ and with disobedience to an injunction.⁴ In such cases it makes no matter what was the intention of the party resisting the order of the court. Whether this resistance were intentional, or whether it were in knowledge of the existence of the decree resisted, or in ignorance thereof, makes no matter. An obstacle stands in the way of the execution of the court's decree, and that obstacle must be removed. Nor is it any defense in such case that the resistance is to a receiver whom the court appoints. The receiver is as much an officer of the court as is an officer appointed by the court to summon witnesses or to execute final process. Resistance in the first case is as much an obstruction of the process as is resistance in the last two cases. It may be objected that this bears with unnecessary harshness on persons ignorantly impeding the action of the receivers in a case such as the present. The same objection, however, applies to all other cases of resistance of process; and if the objection were held good, no process whatever could be enforced against parties who are so stupid or so angry as not to understand what is the nature of the authority which they resist. The relief in all such cases is an appeal to the clemency of the court, which will permit no penalty greater than the merits of the case demand. But, whatever be the penalty, the process of the court must be obeyed.

FRANCIS WHARTON.

Washington, May 6, 1885.

¹ U. S. v. Keen, 5 Mason, 453.

² Daniell, Ch. Pr. 1533; 2 Wait, Pr. 108-112.

³ Id.

⁴ Woodworth v. Rogers, 3 Wood. & M. 135; Rogers v. Rogers, 38 Conn. 121.

THE PENNLAND.¹

(District Court, S. D. New York. March 19, 1885.)

1. COLLISION—STEAMER AND SAILING VESSEL—CROSSING COURSES—RULE 20.

Where a collision occurs between a steamer and a sailing vessel, the former being obliged under rule 20 to keep out of the way, the steamer will be held liable, unless she excuses herself by proof of some misconduct on the part of the sailing vessel, or by proof of such a condition of fog, and of such a compliance on her part with all the rules of navigation, as to absolve her from fault, and reduce the case to one of inevitable accident.

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

2. SAME—SPEED IN FOG—CASE STATED.

The brig S. C., sailing by night, close-hauled, on a S. S. W. course, saw off her port beam both colored lights of the steamer P., estimated a half mile or more distant, and kept on without altering her course. There was a thickness of the atmosphere down near the water, such as to cause a serious obstruction to the visibility of lights. The P., running nearly 12 knots an hour on a course W. by N. $\frac{1}{4}$ N., saw the brig's red light about 600 yards off, nearly ahead, and then, without decreasing her speed, starboarded and changed her course five points during about a minute and a half following, when, in the act of slowing, she was struck by the brig about 80 feet forward of her stern. The above facts being found upon very conflicting evidence, *held*, (1) that in such a condition of weather the steamer should have gone at a reduced speed; (2) that, as the red light of the brig was seen nearly ahead, and the wind being westerly, the steamer must have known that the brig was going to the southward of the steamer's course, and consequently should not have altered her course so as to attempt to cross the bows of the brig, but should have ported and gone astern; and that the steamer was solely liable for the collision.

3. SAME—FLASH-LIGHT—BURDEN OF PROOF—PROXIMATE CAUSE.

Where it clearly appears that a lighted torch, exhibited by a sailing vessel to an approaching steamer, could not have conveyed any additional information of any use to such steamer, the omission of it is not a proximate cause of the collision, and is immaterial. The burden of proof to establish that it would not have given additional information is upon the sailing vessel. *Held*, that in this case she had done so.

In Admiralty.

At about 2 a. m. on the fifth of July, 1883, the steam-ship *Pennland*, of the Red Star line, bound from Antwerp to New York, when near Nantucket, in crossing the bows of the brig *Stacy Clark*, bound from the Kennebec river to Savannah, carried away the latter's jib-boom, bowsprit, and head-gear, to recover damages for which this libel was filed. The brig was 136 feet long, 373 tons register, loaded with ice, sailing close-hauled upon her starboard tack, in a moderate wind from the westward, in a rough sea, a hazy or foggy night, and heading S. S. W. She kept her course until the collision. The *Pennland* was an iron steamer 350 feet long, and, until a short time before the collision, was making, according to her own testimony, a compass course of W. by N. $\frac{1}{4}$ N. After 12 o'clock, though it was fine and clear overhead, it became hazy below, which about 2 o'clock, very shortly before the collision, increased to a thick fog. Her fog-whistle had been started, and three blasts given, about a minute apart or a little less, before the collision. Her previous speed was from $11\frac{1}{2}$ to 12 knots. Shortly after the first blast of the steam-whistle, the second officer, who was in charge of the navigation, signaled to the engineer in charge, first, to stand by; and afterwards, to go half speed. The signals were obeyed. The engineer testified that he was in the act of obeying the half-speed signal when the shock of the collision came. The brig's red light was first seen a little on the starboard bow, at an interval before the collision variously estimated by the steamer's witnesses of half a minute to a minute and a half. When the red light was seen, the steamer's helm was put hard a-starboard to go ahead of the brig, because, as the first officer states, the brig was judged to be too near to attempt to go astern of her by port-

ing. The fourth officer, who was in the wheel-house, estimates that the steamer ran about a minute and a half under her starboard wheel, and that she changed her course five points up to the time of the collision. No fog-horn was heard from the brig. Two of her witnesses, however, testify that they heard the steamer's fog-whistles, and answered each with a fog-horn; that the weather was hazy, but not foggy; that they saw the steamer's green light about abeam on the port side, estimated at a mile distant. No flash-light was exhibited.

Benedict, Taft & Benedict, for libellant.

Man & Parsons, for claimant.

BROWN, J. The steamer in this case was bound under rule 20 to keep out of the way of the brig. She must be held answerable for not having done so, unless she excuses herself by proof of some misconduct on the part of the brig, or by proof of such a condition of fog, and of such a compliance on her part with all the rules of navigation, as absolve her from fault and reduce the case to one of inevitable accident. *The Carroll*, 8 Wall. 302-304. The principal controversy has been in reference to the existence and character of the alleged fog. The difference between the witnesses is to some extent verbal, rather than substantial. Both sides speak of the weather as in a condition of increasing haziness, rather than of fog proper. Some of the claimant's witnesses speak of it as very thick at the time of the collision; while the captain of the brig insists that there was no fog proper until an hour after the collision, and that lights at the time of the collision could be seen a mile. It is evident, however, that there was such thickness in the atmosphere down near the water, though clear overhead, as to cause a serious obstruction in the visibility of lights, as contemplated by the rules of navigation, though I have no doubt that the greater thickness of the fog subsequent to the collision has been referred by the claimant's witnesses to the time of the collision itself. The thickness of the fog is material only as respects the distance at which the brig's red light could be seen on board the steamer. There are sufficient circumstances in the case to show conclusively that her red light not only could be seen, but was seen, at such a distance as to charge the steamer with fault. Mere estimates of time and distance, not confirmed by acts done at the time, are entitled to little weight. But such acts are proved in this case to have been done after the brig's red light was seen, as show that the interval was not far from a minute and a half, and the distance traversed by the steamer not far from 600 yards. The fourth officer estimates the interval at a minute and a half from the time when the steamer's helm was starboarded, in consequence of seeing the red light, until the collision. He was in the pilot-house at the time, and testifies that the steamer went off five points under her starboard wheel. The proofs before me in other cases as to the rate of the change of steamers of this class show that this change would be made in about 600 yards. See *The Lepanto*, 21 FED. REP. 651, 664. The *Pennland*, being somewhat

larger than the Lepanto, would make a larger circle, other conditions being in proportion. As the steamer's speed was about 12 knots, and was not checked up to the time of the collision, this would give precisely a minute and a half as the interval during which a change of five points would be made, assuming the mean average rate of one point's change in 360 feet. It is possible that the fourth officer's estimate of time was based in part upon his knowledge of the rate at which the Pennland changed her course.

Again, there were three whistles about a minute apart given as a fog signal prior to the collision. Several of the witnesses state that the red light was seen between the first and second whistles. The captain, also, had time to dress himself hurriedly in the same interval. It is urged for the claimants that the time was much shorter than this, because it appears that the engineer was in the act of obeying the order to slow down at the moment of collision; while this order, it is said, was given immediately after the first whistle, and immediately obeyed. But entire reliance cannot be placed on the several items which make up these premises. There were two orders to the engineer: one to stand by, followed by an order to slow down. It would be very easy for the officer in charge to mistake the precise order of sequence in which these various directions and the whistles were given, and the interval which separated them. *The Arklow*, L. R. 9 App. Cas. 136, 141. This kind of testimony is evidently insufficient to rebut the circumstances I have above referred to. The inevitable inference is, either that the order to slow down was not given until after the third whistle, or else that the engineer was tardy in obeying it. While a considerable time is necessary for some vessels to reverse the engine and get it working astern, but a few seconds is needed to execute the order to slow upon a steamer making, like this, 55 revolutions per minute.

The testimony of the witnesses for the brig is certainly not without some weight as to their estimates of time and distance, although much less trustworthy as respects the distance at which their own light would be seen from the steamer. They estimate that the steamer's green light was seen a mile distant; but her light may have been seen, and probably was seen, at a greater distance than the brig's, as the steamer's light was probably a stronger light and higher above the water. There is no reason to distrust the testimony of the captain, that on hearing the report of the steamer's lights he came up from the cabin; saw both colored lights of the steamer about abeam; took a hasty look at his own red light to make sure it was burning brightly; returned to the companion-way; observed the red light of the steamer then shut in; knew from that circumstance that the steamer had starboarded, so as to cross his bows, because in no other way could the red light under the circumstances have been shut in; and that he immediately took the wheel, because he recognized the consequent danger of collision; and his estimate is that it was from one to two

minutes after that change that the collision occurred. These circumstances all together furnish more satisfactory proof than the court is often obliged to act upon in collision cases, and show that the time between the collision and the first notice of the brig's light by the steamer was not far from a minute and a half, and that the distance traversed by the steamer was not far from 600 yards. If an arc be projected of that length, covering five points of a circle, (given by a radius of about 1,825 feet,) it will be seen that between starboarding and the collision the steamer must have made an offing to the southward from her previous course (counting from her main rigging) of about 625 feet. As the brig was but 136 feet long, or, including her bowsprit and jib-boom, possibly 170 feet, it is clear that had the steamer kept her course she would have passed far astern of the brig; and it is equally clear that no admissible margin of variation from the estimate of the rate of change in her course above made would make any material difference in this result.

From the above considerations two faults of the steamer become clear: (1) Assuming that there was a sufficiently dense haze or fog, as her witnesses assert, to require the sounding of the fog-whistle at the time when the first whistle was given,—namely, the third blast before the collision,—it was her duty to go at moderate speed under rule 21; that is, reduced speed. *The Colorado*, 91 U. S. 692; *Clare v. Providence & S. S. Co.* 20 FED. REP. 526; *The Beta*, L. R. 9 Prob. Div. 134. (2) From the direction of the wind it was manifest to the steamer, inasmuch as the brig's red light was seen, that the brig must be going to the southward; that she could not be moving at a greater angle than at right angles with the steamer's course, and might be approaching her at a much less angle. There was, therefore, manifest risk of collision, unless the steamer could avoid it by porting; and that she did not do, but starboarded. The risk of collision was, therefore, imminent until she had crossed the brig's bows upon the course adopted. The rule in such cases positively requires a steamer to slacken her speed, and, if necessary, to stop and back. She did neither, during the interval of about a minute and a half; and she was only in the act of slowing when the collision took place. It is true that a steamer is not bound to slacken speed when it is clear that continuing at full speed offers the only chance of escape. But in departing from the rule the steamer takes upon herself the burden of showing that such a departure was necessary. *The Alaska*, 22 FED. REP. 548, 553; *The Elizabeth Jones*, 112 U. S. 514, 523; S. C. 5 Sup. Ct. Rep. 468, 473; *The Elizabeth Jenkins*, L. R. 1 P. C. App. 501. The event in this case shows that no such departure was necessary, and that there could not have been any such circumstances existing at the time as even apparently justified it.

The brig was at the least 500 yards distant from the steamer when her red light was seen. Several of the steamer's witnesses, indeed, say that the brig's red light was first seen two and a half points on their

starboard bow. This is a manifest error. If that had been her position, the steamer's two colored lights could not at any time have been seen upon the brig; whereas all her witnesses testify that they were both seen together when the steamer first came in view. The brig, moreover, in order to reach the place of collision from a situation two and a half points on the steamer's starboard bow at a distance of 500 yards, would have been obliged to traverse at least 400 yards; a speed, during a minute and a half, equal to nine knots, or nearly twice her actual speed. After the steamer changed her course to port, the brig bore upon her starboard bow, and so remained until the collision. The speed of the brig is stated to have been from four to five knots; and as the wind, according to all the witnesses, was only moderate, there is no reason to believe it greater. In reaching the place of collision by a change of five points, the steamer diverged, as I have said, somewhere about 650 feet from her former course; the precise amount is immaterial. The brig, during the interval of a minute and a half, passed over somewhere from 600 to 750 feet, and tracing her backward a minute and a half, we should find her in a position to see both colored lights of the steamer abeam. This corresponds so entirely with the statements of the brig's witnesses, that they did see both colored lights of the steamer abeam, that their truth cannot be doubted. It follows, consequently, that when the steamer starboarded, so as to shut out her red light from the brig, the brig could not have been to any considerable degree on the steamer's starboard bow; but must have been nearly ahead. Under such circumstances, to starboard, in the endeavor to pass ahead of the brig's known course, instead of going astern, cannot be excused as a mere error of judgment. The steamer had only to continue her course and no danger would have arisen. Her starboarding was, therefore, a third fault; and upon these grounds the steamer must be held.

2. Two faults are alleged against the brig: *First*, that she did not blow her fog-horn; *second*, that she did not exhibit any flash-light as required by section 4234. I cannot disregard the testimony of the men on the brig, that a fog-horn was blown as soon as as they heard the whistles from the steamer, although the horns apparently were not heard. It is admitted that no lighted torch was exhibited. But though the statute requires a torch-light to be exhibited, it does not declare that the sailing vessel shall be answerable for a subsequent collision if she fail to exhibit it, without regard to the question whether her failure to exhibit it had anything to do with the collision or not. When it clearly appears, therefore, that the exhibition of such a torch could have done no good,—that is, could not have conveyed any additional information of any use to the steamer, and could have made no difference in the result,—the omission of it is immaterial. *The Leopard*, 2 Low. 238; *The John H. Starin*, 2 FED. REP. 100; *The Margaret*, 3 FED. REP. 870; *The Oder*, 8 FED. REP. 172. See *The Dexter*, 23 Wall. 76; *The Algiers*, 21 FED. REP. 345. The burden

of proof to establish this is upon the sailing vessel. This burden she has sustained in this case, because it appears that her red light was seen on the steamer in ample time to avoid her. A flash-light could have revealed nothing to the steamer in regard to the brig's position or course which she did not fully and seasonably know. It might have done harm by obscuring the brig's red light; and that would have caused evident embarrassment, while the failure to show a torch-light did not create any embarrassment to the steamer or withhold any useful information. There is no ground to suppose that the exhibition of a torch-light would have been followed by any different maneuver by the steamer, or that it would have made the slightest difference in the result. The failure to show it was, consequently, immaterial within the cases above cited, and was in no sense one of the proximate causes of the collision. *Spaight v. Tedcastle*, L. R. 6 App. Cas. 217, 219; *Cayzer v. Carbon Co.* L. R. 9 App. Cas. 873, 882, 886.

The libelant is therefore entitled to a decree with costs; and a reference may be taken to compute the damages.

THE WILLIAM F. McRAE.

(District Court, E. D. Michigan. January 26, 1885.)

ADMIRALTY PRACTICE—LIBEL FOR COLLISION—DISMISSAL—SUBSEQUENT LIBEL BY WIFE CLAIMING AS OWNER OF VESSEL.

A. B., averring himself to be the owner of a vessel injured by collision, filed a libel against the offending vessel. This libel was subsequently dismissed by reason of his failure to give security for costs. While his suit was still pending, his wife, appearing by the same proctors, and averring herself to be the owner of the injured vessel, filed another independent libel for the same collision, and caused the offending vessel to be arrested a second time. *Held*, that the wife should have made herself a party to her husband's suit, and that her libel should be dismissed.

In Admiralty.

This was a libel for a collision, promoted by Elizabeth McClure, who was averred to be the owner of the scow Frank Morris, the injured vessel. The case was submitted to the court informally upon the sufficiency of the following averment in the answer:

"(5) Respondent, further answering, says that on the sixth day of October, A. D. 1883, a libel was filed in this court by one George McClure, who is reputed to be the husband of the libelant herein, against the said tug William F. McRae, etc., for the same cause of action, as will more fully appear by an inspection of said libel; that said tug William F. McRae was arrested in said suit, and subsequently was duly released on a good and sufficient bond given, in due form, for the sum of \$4,940, and that thereby the said tug was forever discharged from said cause of action, so that this suit cannot now be maintained against her."

James J. Atkinson, for libellant.

J. W. Finney, for claimant.

BROWN, J. That a vessel discharged from arrest upon admiralty process by the giving of a bond or stipulation for her value, or for the payment of the amount claimed in the libel, returns to her owner freed forever from the lien upon which she was arrested, and can never be seized again for the same cause of action, even by the consent of parties, is a proposition too firmly established to be open to question. *The Kalamazoo*, 9 Eng. Law & Eq. 557; *The Wild Ranger*, Brown. & Lush. 84; *The Union*, 4 Blatchf. 90; *The White Squall*, 4 Blatchf. 103; *The Old Concord*, 1 Brown, Adm. 270; *The Josephine*, 4 Cent. Law J. 262.

The general principle is further illustrated in the case of *The Thales*, 3 Ben. 327. In this case, a libel was filed against the bark *Thales* to recover a balance remaining due for certain repairs, etc. Subsequently, this suit was discontinued and the costs paid. Still later, another libel was filed by the same libellants for the same cause of action, and the vessel arrested and bonded a second time. It was insisted that the discontinuance of the former suit, with the consent of the claimants therein, and the payment of the costs, which had been accepted by them, operated to make the arrest of the vessel in the second suit an original arrest, and not a second arrest. It was held, however, that the case fell within the principle of *The Union* and *The White Squall*, and that the court had no power, in the absence of fraud or mistake, to order her arrested a second time, and that the fact that the first suit was discontinued with the consent of the claimants indicated no intention, actual or in law, to subject the vessel to a second arrest, or to waive the rights in that respect which then belonged to them. This case was affirmed by Judge WOODRUFF upon appeal to the circuit court. 10 Blatchf. 203.

There is occasionally, however, difficulty in determining whether the second arrest is for the same cause of action as the first. Thus a libel by the owner of a ship for damages by collision would obviously be no bar to a second action by the owner of the cargo for damages suffered by him in the same collision, although it has been held, doubtless correctly, that if the ship-owner sues for damages both to the ship and cargo, as he may do under the practice of the admiralty courts, the owner of the cargo cannot afterwards file a libel in his own name, but must petition to be made a co-libellant in the first suit. *The Nahor* 9 FED. REP. 213. In delivering the opinion in this case, Judge CHOATE remarked that "the vessel, having given bail for the value of the cargo in the first action, and the action being properly brought by the master and owners, as carriers, for the loss of the cargo, she was not liable to be again arrested for the same cause of action."

The rule, then, manifestly applies only to those cases wherein the libellant might have asserted his rights in the first action; and the real

question in this case is whether the libelant was not bound to appear in the suit begun by her husband, and ask to be made a co-libelant, or be substituted for him as sole libelant. Although it is not expressly averred in the answer in this case, it appears by the record of the former case that George McClure, the husband of the libelant, filed his libel for this collision October 6, 1883, averring himself to be the owner of the *Frank Morris*; and that his libel was dismissed April 7, 1884, for failure to file security for costs. Pending her husband's suit, and on the tenth of December, 1883, Elizabeth McClure, the present libelant, appearing by the same proctors, and claiming herself to be the owner of the injured vessel, filed her libel in the exact language of the first libel, except in respect to the allegation of ownership, and procured a second arrest of the vessel for the same collision. Under these circumstances, there can be no question that she had legal notice of the pendency of her husband's suit. Could she have been substituted in place of her husband as sole libelant in that suit? I should have had little hesitation in saying that she could, were it not for the opinion of Mr. Justice SWAYNE in the case of *The Detroit*, 1 Brown, Adm. 141.

This was a suit for towage services, begun in the name of *John K. Harrow*, who was supposed to be the owner of the tug. After answer filed, and the testimony of one witness had been taken, it was discovered that *James P. Harrow* was the owner of the tug at the time the services were performed. Upon an affidavit that the proctor had been misinformed at the time the suit was commenced, an amendment was permitted, substituting *James P.* for *John K. Harrow* as libelant. A motion to vacate the order permitting the amendment was afterwards made, and denied by the district court. On appeal to the circuit court it was held by the learned justice that there was no authority to make this order, and that the substitution of one sole libelant for another is substantially the institution of a new suit. This point was not decided in view of the contingency which has arisen here; and the general rule that a vessel once arrested and bonded is to be regarded as forever freed of that lien, appears to me to be so wholesome a one that I am unwilling to admit exceptions to it, unless in a very clear case. With the utmost respect for the learned justice who decided the case of *The Detroit*, I am constrained to say that I think the technical rule that one libelant can be substituted for another ought to give way to the general rule above stated, and to the still more equitable principle that where an action is substantially between two vessels, a mistake of the pleader as to the ownership or legal title of the injured vessel (a mistake which in actual practice is very likely to occur) ought to be corrected by an amendment. It was decided by the supreme court in *The Commander in Chief*, 1 Wall. 43, that new parties may be added, and parties improperly joined may, on motion, be stricken out. And in *Jennings v. Springs*, Bailey, Eq. 181, it was held to be within the discretion of

the court to permit a bill to be amended by substituting the name of a new for an original complainant, even after answer filed. Here the bill had been filed by an agent of the real complainant.

But whether libelant could have been substituted for her husband or not, I see no objection to her being joined as co-libelant, and to the court making such decree upon the final hearing as to the distribution of proceeds as the justice of the case might require. In the case of *The Tillie*, 13 Blatchf. 514, a canal-boat wholly owned by a married woman was injured in a collision with a steam-tug. Her husband filed a libel *in rem* in his own name, as owner, against the tug, to recover damages sustained. On the trial, the wife testified as a witness for her husband, and gave material evidence to sustain his claim for damages. It was shown that in fact the action was brought by and with the assent of the wife, and it was held that the wife would be equitably estopped from bringing another suit, and that the libel of the husband could be maintained. If, from the circumstances of this case, an equitable estoppel could be said to arise, *a fortiori*, would the wife be estopped if she appeared in her husband's suit and asked to be made a co-libelant with him.

While the operation of this rule may work a hardship to the libelant in this case, I do not see how, upon principle or authority, her suit can be sustained.

WILKINSON and others v. DELAWARE, L. & W. RY. Co.

(Circuit Court, D. New Jersey. March 13, 1885.)

REMOVAL OF CAUSE—DEMURRER—TIME OF APPLICATION—STIPULATION TO FILE NEW PLEADINGS.

Where a demurrer has been filed in a cause pending in the state court raising an issue that would be triable at the regular term of the state court, but a stipulation has been filed by which it is agreed to withdraw the pleadings and file a new declaration and plea making an issue of fact, the case cannot, after the term at which the demurrer would have been heard, be removed to the United States court.

Motion to Remand.

NIXON, J. A second application is now made to remand this cause to the state court. On the first, I refused to remand, for reasons stated in the opinion filed. 22 FED. REP. 353. I think the decision was correct, in the light of the facts as they were then presented to the court; but on this renewal of the motion the facts appear quite materially changed. In the moving papers there is (1) the affidavit of Arthur H. Ely, of counsel with the plaintiffs, showing that on the tenth December, 1883, a declaration was filed in the action in the supreme court of New Jersey, where the suit was originally commenced; on the twenty-second of the same month, demurrer; and on the eighth of January, 1884, a joinder in demurrer; and (2) copies of the said declaration, demurrer, and joinder in demurrer, with a stipulation of the parties, dated June 4, and filed June 6, 1884, signed by the respective attorneys, in which it was agreed as follows:

"It is hereby stipulated and agreed by and between the attorneys of the plaintiff and defendant in the above case: (1) That the plaintiff shall, within twenty days from that date hereof, file an amended declaration; (2) that from the time of the filing of said declaration the demurrer heretofore filed by the defendant shall be withdrawn and of no effect; (3) that the defendant will plead to said amended declaration within thirty days from the date of service of the same upon his attorneys; (4) that the above shall be without prejudice or costs against either party, but each shall pay their own costs.

"Dated June 4, 1884."

—and (3) the certificate of the clerk under the seal of the court verifying the said papers as true copies of the declaration, (original,) demurrer, and joinder thereto, and the stipulation in said cause, as the same remained on file in his office. Acting under the provisions of this stipulation, the amended declaration was filed June 12, 1884; a plea of the general issue July 5, 1884; and the *similiter* July 12, 1884.

It appears from the Revised Statutes of New Jersey (tit. "Courts") that the then stated terms of the supreme court, where issues of law were triable, are held on the fourth Tuesday of February, and the first Tuesdays of June and November, of each year; and the stated terms of the Hudson county circuit court, where the issues in fact were triable, are on the first Tuesdays of April, September, and De-

cember. The petition for removal was filed October 18, 1884. The demurrer put in by the defendant to the first declaration was general, alleging that the matters therein contained were not sufficient in law to maintain the action. If a plea had been filed an issue of fact would have been formed, which would have been tried at the May term of the Hudson county circuit, but the demurrer raised an issue of law which could have been argued in the regular course of practice at the June term of the supreme court. Instead of this the parties agreed, in their stipulation, to withdraw the pleadings and file a new declaration and plea making an issue of fact. The question is, did the defendant, by such action, lose its right under the third section of the act of March 3, 1875, to remove the cause into the federal court? The construction of the section by the supreme court in *Babbitt v. Clark*, 103 U. S. 606; *Alley v. Nott*, 111 U. S. 472; S. C. 4 Sup. Ct. Rep. 495; *Scharff v. Levy*, 5 Sup. Ct. Rep. 360; and *Pullman Palace Car Co. v. Speck*, 113 U. S. 84; S. C. 5 Sup. Ct. Rep. 374, renders it manifest that the right of removal has been lost by the delays of the parties in pleading; and the cause is accordingly remanded.

WILKINSON and another v. DELAWARE, L. & W. RY. CO.

(Circuit Court, D. New Jersey. March 2, 1885.)

1. REMOVAL OF CAUSE—RECORD—STIPULATION—CERTIORARI.

Where by stipulation of the parties certain pleadings in the state court have been taken out of the case, the circuit court will not grant a *certiorari* to order the clerk of the state court to add such pleadings to the record.

2. SAME—EVIDENCE.

Although such pleadings have been taken out of the record by stipulation, they may be used in the United States court, when properly verified, to show what has been done in the state court, with a view to showing that the application for removal was made too late.

In *Assumpsit*.

NIXON, J. The above suit was brought here by the defendant on a petition for removal from the supreme court of New Jersey. On filing the record, a motion was made by the plaintiffs to have the same remanded to the state court, on two grounds: (1) Because the defendant corporation, although chartered by the state of Pennsylvania, had become a citizen of New Jersey, as the lessee of the Morris & Essex Railroad, and by the legislation of the state confirming the said lease; and (2) because the petition for removal was filed too late. 22 FED. REP. 353. After argument and consideration the court held that both grounds failed, and that the cause had been properly removed. Notice is now served upon the defendants of a motion (1) for leave to file in this court, as part of the record of said suit, certain copies of a declaration, demurrer, and joinder in demurrer, duly certi-

fied by the clerk of the supreme court of New Jersey as on file in that court; (2) for this court to issue a writ of *certiorari* to the supreme court of New Jersey, commanding it to make return of the record in said action—and especially of the declaration, demurrer, and joinder in demurrer—as to which a diminution is alleged.

The facts of the case are these: That suit was originally commenced in the state court, by a summons tested November 26, and returnable December 6, 1883. A declaration was filed therein December 10, 1883; a general demurrer, December 22, 1883; and a joinder in demurrer, January 18, 1884. At this stage of the proceedings, the respective parties entered into the following stipulation, dated June 4, 1884, and filed June 6, 1884:

"It is hereby stipulated and agreed by and between the attorneys of the plaintiffs and defendant in the above case (1) that the plaintiffs shall, within twenty days from the date hereof, file an amended declaration; (2) that, from the time of the filing of said amended declaration, the demurrer heretofore filed by the defendant shall be withdrawn and of no effect; (3) that the defendant will plead to said amended declaration within thirty days from the date of service of the same upon its attorneys; (4) that the above shall be without prejudice or costs against either party, but each shall pay their own costs.

"Dated June 4, 1884."

Under this stipulation a new declaration was filed by plaintiffs June 12, 1884, on which an issue was joined by plea on July 5, 1884. The next term of the Hudson circuit court to which the record could be regularly handed down for trial began on the first Tuesday of September following. At that term, and before the trial of the cause, to-wit, on the eighteenth day of October, during the term, the petition for removal, and a bond executed in the form required by the statute, were filed in the state court, and the clerk sent to this court a duly certified record of the case, containing copies of the following papers:

(1) The summons issued; (2) the above recited stipulation entered into by the parties June 6, 1884; (3) the amended declaration, filed June 12, 1884; (4) the plea of the general issue, filed July 5, 1884; (5) the *similiter*, filed July 12, 1884; (6) the petition for removal and the bond accompanying the same, filed October 18, 1884; certifying that they were a true copy of the entire proceedings in said cause as the same remained on file in his office.

It will be perceived that he left out of the record the pleadings that had been filed previous to the stipulation, and which, as the defendant claims, ceased to be a part of the record by virtue of the stipulation. The counsel for the plaintiffs then applied to the clerk of the state court to amend the record by incorporating these pleadings therein, which the clerk declined to do without the order of the court. Application was then made to the state court for an order upon the clerk, and it is conceded that the judges refused to act in the matter. The clerk of the state court has, however, forwarded to the counsel for the plaintiffs copies of these pleadings, with the certificate added, dated January 26, 1885, that they are true copies of the declaration,

(original,) demurrer, and joinder thereto, as the same remained on file in his office. They are annexed to the moving papers on this motion, and we are asked (1) for an order to have them filed as a part of the record of the case from the state court.

It is apparent from the form of the request that the counsel of the plaintiffs have taken notice of the change which the removal act of March 3, 1875, has made in the matter of the copies of the papers to be transmitted from the state to the federal court. Under previous acts the condition of the bond was that the petitioner should enter in the circuit court on the first day of the next session "copies of the process against him and of all pleadings, depositions, testimony, and other proceedings in the cause." The phraseology is changed in the later enactment, and all that is now required is that he shall enter "on the first day of its then next session a copy of the record in such suit." Whether the court should make an order as requested, depends upon the question whether the original declaration, demurrer, and joinder in demurrer, which have been withdrawn from the case by the stipulation of the parties, without prejudice and without costs, are still to be regarded as a part of the record of the suit? They were abandoned and withdrawn by consent. They have no place nor office in the pleadings which led up to the issue to be tried. The record of a suit has been defined to embrace the successive judicial steps which have been taken and are necessary to show jurisdiction and regularity of procedure; the process writ or summons, with proof of service; the pleadings, minutes of trial, verdict, and judgment; and also ancillary and interlocutory proceedings, entering into and supporting the action. 2 Abb. Law Dict. 388. The clerk very properly made the stipulation of the parties, whereby these pleadings were taken out of the case, a part of the record; and quite as properly, we think, declined to incumber the record with what they had agreed should form no part thereof. We must therefore refuse to enter an order to add to the record any papers which do not constitute any part of the record of the suit.

2. The application for a writ of *certiorari* to the state court, commanding it to make return of the record in the cause, is under the provisions of the seventh section of the act of 1873. The section was to be resorted to in a case where a clerk of the state court had refused, on a proper application, to furnish the petitioner with a copy of the record, for the reasons heretofore stated. We are not of the opinion that the clerk of the state court has been derelict in duty, and we decline to order the writ to issue.

It became manifest from statements made on the argument that counsel for plaintiffs was desirous of getting all the proceedings of the state court before this court, to enable him to show that, under the recent decisions of the supreme court, narrowing the interpretation of the act of 1875, the defendant has lost the right of removal. These cases have recently made their appearance in the reports, and,

unless we have misunderstood their purport, they will have the effect of cutting off to a large extent the future removal of causes. We refer to *Alley v. Nott*, 111 U. S. 472; S. C. 4 Sup. Ct. Rep. 495; *Scharff v. Levy*, 5 Sup. Ct. Rep. 360; and *Pullman Palace Car Co. v. Speck*, 113 U. S. 84; S. C. 5 Sup. Ct. Rep. 374.

Although these pleadings have been taken out of the record by the stipulation of the parties, they are, nevertheless, a part of the proceedings in the case, and as such may be used here, when properly verified, to prove what has been done in the state court.

PACIFIC RAILROAD v. MISSOURI PAC. RY. CO.

(Circuit Court, D. Kansas. November, 1883.)

1. REMOVAL OF CAUSE—CITIZENSHIP—CORPORATION, HOW A CITIZEN OF A STATE.

Strictly speaking, corporations cannot be citizens, and in order to hold them amenable to federal jurisdiction, on the ground of citizenship, it is necessary to assume that all the stockholders are citizens of the state by which the corporation was created.

2. SAME—BUSINESS AND OFFICE IN ANOTHER STATE.

A corporation for jurisdictional purposes is a citizen of the state by which it was created, even if all its business is transacted elsewhere, and all of its offices and places of business are outside of the state.

3. SAME—CONSOLIDATED CORPORATIONS—SUIT BY CORPORATION.

A consolidated corporation formed by the union of six corporations, three of which were organized under the laws of Missouri and three under the laws of Kansas, will be presumed to be a citizen of both states, and, when sued in a state court in Kansas by a corporation organized under the laws of Missouri, cannot remove the cause to the federal court.

On Motion to Remand.

James Baker, for plaintiff.

Thomas J. Portis, for defendant.

MCCRARY, J. This cause having been removed from a state court, is now, by agreement of counsel, submitted as upon motion to remand, upon facts appearing in the record and by a stipulation on file, and which are as follows:

(1) The plaintiff is a corporation organized under the laws of the state of Missouri, but had, at the time this suit was commenced, and still has, its chief place of business in the city and state of New York, and has not had for more than five years any officer, office, or place of business in the state of Missouri; (2) the defendant is a consolidated corporation, formed by the union of six corporations, three of which were organized under the laws of Missouri, and three under the laws of Kansas; (3) the property in controversy was the property of one of the Missouri corporations, if it is owned by the defendant at all. All the interest the consolidated company has in the property is derived from one of the Missouri corporations under the articles of consolidation. The cause was removed solely upon the ground of citizen-

ship, and the question to be determined is whether, upon the foregoing facts, it affirmatively appears that this is a controversy between citizens of different states.

The questions to be determined upon these facts are :

(1) Can the plaintiff be held to be a citizen of New York, although created under the laws of Missouri, upon the ground that its only place of business is, and has long been, in the city and state of New York? (2) If it is held that the plaintiff is a citizen of Missouri for jurisdictional purposes, can it be held, upon the facts above set forth, that defendant is a citizen of Kansas, and not of Missouri?

Upon the first question we have no difficulty. Strictly speaking, corporations cannot be citizens; and therefore, in order to hold them amenable to the federal jurisdiction on the ground of citizenship, it has been found necessary to assume, often contrary to the fact, that all the stockholders are citizens of the state by which the corporation was created. It is only by virtue of this assumption that a corporation can be said to be a citizen of any state. The presumption that all the stockholders are citizens of the state under whose laws they incorporate is a conclusive presumption, and the fact will not be inquired into. The fact may be that not one of the stockholders is a citizen of such state; but if so, it cannot be made to appear. The place of transacting business cuts no figure. The corporation, for jurisdictional purposes, is a citizen of the state by which it was created, even if all its business is transacted elsewhere, and all of its offices and places of business are outside of the state. The state may, and we think should, require all of its corporations to keep their principal office within the state, and to have officers or agents there upon whom service of process may be made. This is the law in many states. If it be the law of Missouri, the plaintiff has evidently violated it. However this may be, we are very clearly of the opinion that the plaintiff company, having been organized under the laws of Missouri, cannot become a citizen of New York, for jurisdictional purposes, by establishing its head-quarters in that state, and failing to keep an office in Missouri. If it continues to be a corporation at all, it is to be regarded as a citizen of Missouri. *Railway Co. v. Whitton*, 13 Wall. 270; *Railroad Co. v. Letson*, 2 How. 497; *Marshall v. Railroad Co.* 16 How. 314; *Railroad Co. v. Wheeler*, 1 Black, 297; *Covington Draw-bridge Co. v. Shepherd*, 20 How. 232.

Upon the second question there is more difficulty. The defendant is undoubtedly a single corporation, although formed by the consolidation of six distinct corporations, three of them having been formed under the laws of Missouri and three under the laws of Kansas. The consolidation was had under the laws of both states, the co-operating legislation of both being clearly necessary to that end. In *Railroad Co. v. Harris*, 12 Wall. 65, it was said: "We see no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corpora-

tions into a single one.* And the case of *Railroad Co. v. Maryland*, 10 How. 392, is referred to as recognizing such a power.

Neither of these cases, however, presented the question with which we now have to deal. Here the validity of the consolidation is conceded; but the question is, of what state, if of any, can the consolidated company be said to be a citizen? It is created by the laws of two states. Is it a citizen of both? If not, is it a citizen of either?

We have already seen that a corporation cannot be a citizen in any proper sense of the term, and that such artificial beings are held subject to the federal jurisdiction as citizens, by resorting to the fiction that all the incorporators or stockholders are conclusively presumed to be citizens of the state creating the corporation. What becomes of the fiction when the corporation is created, as in this case, by the laws of several states authorizing the union of several corporations existing in different states? What is to be the presumption in such a case as to the citizenship of the stockholders? Manifestly it cannot be that they are all citizens of either one of the states under whose laws the consolidation was authorized. Before the consolidation there was a conclusive presumption of law that the stockholders in three of the original corporations which were united to form the defendant company were citizens of Missouri, and those of the remaining three, citizens of Kansas. When the six companies were united in one under the laws of both states, we are unable to see how we can say that the same stockholders can be presumed to have suddenly become citizens of one of such states. And still less can we presume, in this case, that they all became citizens of Kansas. In a word, as it seems to us, the fiction above referred to as to the citizenship of stockholders, where the corporation is created by a single state, cannot be applied where the corporation is created by the laws of more than one state; or, if it be applied, so far from enabling us to hold that the corporation may sue or be sued as a citizen of a particular state, it leads to the opposite conclusion. We have thus seen (1) that a corporation cannot be a citizen; (2) but where a corporation is created under the laws of a state, the courts will conclusively presume that the persons composing it are citizens of that state, and therefore will hold the corporation itself amenable to suit in the federal courts the same as a citizen of such state; (3) where, however, the corporation is not formed under or by virtue of the laws of a single state, but under and by virtue of the laws of several states, the presumption, if any is allowed, must be that the persons composing it are citizens of the different states under whose laws the corporation was formed; as, for example, in the present case, that the persons composing the defendant corporation are some of them citizens of Missouri, and others citizens of Kansas.

In order to prevent confusion and misconstruction of our ruling in this case, its exact nature must be kept in view. It is not a case in which a corporation created by one state has been permitted to enter

the territory of another, and there engage in business. In such cases it has been held that there is no new corporation, but only added powers and privileges granted to an existing body, and that it remains a corporation of the state by which it was originally chartered. It refers for the law of its being to the statutes of the state by which it was originally created, although it may have obtained enlarged powers and the right to extend its operations into foreign territory from the legislation of other states. Thus, in *Railroad Co. v. Harris, supra*, the corporation was originally created by the state of Maryland, and subsequently authorized to extend its operations into Virginia and the District of Columbia, by appropriate local legislation, declaring that it should have the same rights and privileges in that state and district as in Maryland. It was held that it remained a corporation of Maryland, and that no new corporation was created either in Virginia or in the District of Columbia. In *Railway Co. v. Whitton, supra*, the corporation was sued as a citizen of Wisconsin, and it appeared that it had been incorporated under the laws of that state. It was insisted that there was a failure of jurisdiction, because the same corporation had also been chartered under the laws of Illinois, of which state the plaintiff was also a citizen. But the court said: "The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin, by the laws of that state. It is not *there* a citizen or corporation of any other state." In other words, as I understand this ruling, it was held that inasmuch as a distinct and separate corporation had been organized under the laws of Wisconsin alone, it was a corporation of that state, and suable as such, notwithstanding the fact that the same incorporation, under the same corporate name, may have been chartered as a corporation under the laws of another state.

But that is not the present case. Here the corporation defendant was not formed under the laws of a single state, but under the laws of two states and by a consolidation, as already explained. The consolidated company cannot point to the laws of either state as the source of its being. It cannot show that it has a legal corporate existence without invoking the statutes of both states, and proceeding in conformity thereto. It cannot claim to be a citizen of each of said states, because, by the law of Kansas, under which the consolidation must have taken place, the several companies were authorized "to consolidate and form *one* company," so that the consolidated company must be regarded as a unit. Besides, as already stated, the presumption that the stockholders are citizens of Kansas, which is the indispensable basis of the claim that the consolidated corporation is a citizen of that state, cannot be allowed for the reasons already stated. This case is also unlike those in which a corporation of one state is authorized to sell, assign, and transfer its property and franchises to a corporation in another state. In such cases the

two corporations are merged into one, and that one is the corporation which purchases the property and franchises of the other. *Antelope Co. v. Chicago, B. & Q. Ry. Co.* 4 McCrary, 46; S. C. 16 FED. REP. 295.

The case of *Railroad Co. v. Wheeler*, *supra*, is analogous to the one now before the court, and the ruling therein seems to us conclusive of the present question. That was a suit brought in the circuit court of the United States for the district of Indiana against Wheeler, who was a citizen of that state; and the declaration stated that the plaintiff was "a corporation created by the laws of the states of Indiana and Ohio, having its principal place of business in Cincinnati, in the state of Ohio," and that it was a citizen of the state of Ohio. The court held that a suit in the corporate name must be regarded as, in contemplation of law, the suit of the individuals composing the corporation, and that, therefore, the action in that case was to be regarded and treated as a suit in which citizens of Ohio and Indiana were joined as plaintiffs in an action against a citizen of the last-named state. "Such an action," said the court, "cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And in such a suit it can make no difference whether the plaintiffs sue in their own proper names or by the corporate name and style by which they are described." And the court further said: "The averments of the declaration would seem to imply that the plaintiff claims to have been created a corporate body, and to have been indueed with the capacities and faculties it possesses by the co-operating legislation of the two states, and to be one and the same legal being in both states. If this were the case, it would not affect the question of jurisdiction in this court." The conclusion announced was that, as the plaintiff corporation was composed of citizens of Ohio and Indiana, it could not maintain a suit in a federal court upon the ground of citizenship alone against a citizen of either of those states.

For these reasons we conclude that the case should be remanded to the state court; and it is accordingly so ordered.

JENNINGS v. PHILADELPHIA & R. R. Co.

(Circuit Court, D. New Jersey. December 22, 1884.)

JURISDICTION OF CIRCUIT COURT—RECEIVER APPOINTED IN ANOTHER STATE—ORDER OF PAYMENT OF CLAIM—NEW JERSEY STATUTE—VERDICT—JUDGMENT.

A verdict before entry of judgment thereon creating no lien on real estate in New Jersey, when a receiver for a railroad corporation, against which such verdict has been obtained, has been appointed before such entry by the United States circuit court for the district of New Jersey, in a proceeding ancillary to

a suit in the circuit court for Pennsylvania, the receiver will not be ordered by the court in New Jersey to pay such judgment; but the plaintiff will be compelled to make application for an order for payment to the court in Pennsylvania.

Rule to Show Cause, etc.

Richard & Lindabury, for the rule.

A. G. Richey, for defendant.

NIXON, J. This case comes up on a rule to show cause why the receivers of the Philadelphia & Reading Railroad Company should not be required to pay the judgment recovered March 29, 1884, by the above-named plaintiff, out of the funds of the said company in their hands as receivers. On the service of the rule the receivers made return (1) that they had no moneys in their hands which were applicable to the payment of the judgment; and (2) that the proceedings under which they became receivers were instituted in the circuit court of the United States in the Eastern district of Pennsylvania; that the decree in this court, by which they were appointed receivers, was the result of proceedings ancillary to those in the Pennsylvania court; that all their accounts were settled in the court where they were originally appointed, and the disbursement of all moneys coming into their hands as receivers was made under the direction of said court; and that the application for the payment of the judgment should be made to the United States circuit court for the Eastern district of Pennsylvania, which directs and controls the disbursements as aforesaid.

The application is made here, and supported by the counsel for the plaintiff, upon the ground that the plaintiff acquired a lien by his judgment on the real estate of the insolvent corporation in this state before the appointment of the receivers; which lien the court has power to enforce by an order on the receivers for payment, or by execution against the property affected by the judgment. The decisive question in the case seems to be whether any such lien was acquired. The facts are that the plaintiff, suing the defendant corporation in this court for damages in a case of collision with a train of the Lehigh Valley Railroad Company, at the point where the two roads cross each other, obtained a verdict in said suit on the twenty-seventh of March last. No judgment was entered on the verdict, and no steps taken to enter one, until the sixth day of June following, when the defendant corporation itself applied and obtained a rule therefor. But, in the mean time, proceedings had been taken in the circuit court for the Eastern district of Pennsylvania against the defendant as an insolvent corporation, under which, on June 2d, receivers had been appointed, and on ancillary proceedings in this court, on the same day, the same gentlemen were named receivers here. This was deemed necessary in order to give them the control of the property of the corporation in this jurisdiction. When they took possession, on June 2, 1884, was any lien existing on the real estate which this

court ought to enforce in aid of the plaintiff's judgment? The judgment was formally entered after the date of the appointment of receivers; but the plaintiff's counsel insisted, on the argument, that he had secured a lien on the property in New Jersey by virtue of the provisions of section 194 of the practice act of the state, alleging that the judges of the supreme court of the state were accustomed to treat the verdict, before the entry of a judgment, as a lien upon the real estate of the defendant. He produced no authority, and we have not been able to find any, for such a construction of the words of the section.

Section 192 abolishes judgment rolls as such, and directs how the clerk shall make up a judgment record, to-wit, by entering in a separate book the warrants of attorney, declaration, pleadings, proceedings, and judgment in every civil cause. Section 194 simply provides that, until the clerk shall have done this in a case, "the verdict or rule for judgment in the minutes of the court shall be held and taken, in the court in which the same is obtained, to be the record of the judgment in such cause, and shall be received in evidence in said court as such judgment as fully as if the record had been made up and signed as by said section 192 required."

This is clearly a provision which authorizes a court to treat the entries or rules for judgment in its own minutes as evidence of the record of a judgment, before the clerk has had time to make up the record. If the legislature had intended to do more than this, and to repeal the statute existing continuously since the last century, "that no judgments shall affect or bind any lands, tenements, hereditaments, or real estate but from the time of the actual entry of such judgment in the minutes or records of the court," it would have done so in more explicit terms.

We therefore hold that when the receivers took charge of the property the plaintiff had acquired no lien by virtue of the verdict. The business of the corporation since their appointment has been conducted under the supervision and control of the court in which the receivers were first appointed. Monthly reports reveal to judges there the condition of the estate, and that is the proper forum to which to apply for orders for the payment of claims.

The rule to show cause must be discharged.

HIS IMPERIAL MAJESTY, THE SULTAN OF THE OTTOMAN EMPIRE, *v.* PROVIDENCE TOOL Co. and others.

(Circuit Court, E. D. New York. August 22, 1883.)

EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—REV. ST. § 723.

A bill in equity that asserts that plaintiff is entitled to certain property in the possession of the defendant, and prays that it be delivered up, and that defendant may be decreed to specifically perform his contract to deliver it, and may be enjoined from setting up any claim to it, and that if he has any lien thereon redemption may be allowed therefrom, does not state a case within the equity jurisdiction of a United States circuit court, as plaintiff has an adequate remedy at law by the action of replevin.

In Equity.

Evarts, Southmayd & Choate, for complainant.

Butler, Stillman & Hubbard and *B. F. Thurston*, for defendants.

BLATCHFORD, J. The bill in this case is founded wholly on an assertion of the legal title of the plaintiff to the rifles and equipments in question. Its prayer is for a decree that the plaintiff has the title to such property and the right to its possession, and that the defendants have no title to it, or valid lien on it, or right to retain it, and that it be delivered over by the defendants to the plaintiff. A claim of such a character is, in the courts of the United States, under the distinction maintained by the constitution of the United States between law and equity, and enforced by section 723 of the Revised Statutes of the United States, the subject of a suit at law, and a plain, adequate, and complete remedy is afforded by an action of replevin. This principle is established by numerous cases. *Grand Chute v. Winegar*, 15 Wall. 373; *Root v. Railway Co.* 105 U. S. 189, 212.

The bill prays that the tool company be compelled to specifically perform its undertakings with the plaintiff, and that the defendants be restrained by injunction from setting up any right or title to, or lien on, the property. But these prayers do not change the attitude of the case. The tool company agreed to make the articles and deliver them to the plaintiff. The plaintiff alleges that the articles have been made and paid for, and that the title to them has passed to the plaintiff. The case is one of the enforcement of the legal title to chattels in existence, and has no different legal aspect from what it would have had if the chattels had not been made under a contract, but had come otherwise into the possession of the tool company from that of the plaintiff. As to the injunction, that might be asked for in every case of the assertion of a legal title to property by a plaintiff, and thus every case of the kind be made one of equitable cognizance. The bill is not one recognizing a lien and asking to redeem from it. It asserts title and denies any lien, and prays for a delivery of the property. Then it has a second and alternative prayer,

that, as to any of the property on which there is a lien, redemption therefrom be allowed. But the suit is still a replevin suit in the guise of a suit in equity.

The foregoing considerations proceed wholly on the view that the articles are in existence, and have been paid for and belong to the plaintiff; that he makes no claim for damages for the value of the articles; and that damages would not give him what he is entitled to. If he could be compensated in damages, trover would be a plain, adequate, and complete remedy. It may be that, in the course of a replevin suit, if one be brought, a case for equitable interposition may arise. But one does not now exist. The application for an injunction is denied, and the restraining order of November 3, 1882, is vacated.

ALLEN v. O'DONALD and others.

(Circuit Court, D. Oregon. May 8, 1885.)

1. CREDITOR AND SURETY.

A creditor who has or acquires a lien on the property of his debtor as a security for his debt, is a trustee of the same for the benefit of the surety, if there be one, and if by any willful act of his such lien is lost or destroyed, to the injury of the surety, the latter is so far discharged from liability for the debt.

2. SAME—BURDEN OF PROOF.

When a creditor relinquishes a lien he may have on the property of his debtor, in a suit to collect his debt from the surety, the burden of proof is on him to show that the surety was not injured by such relinquishment.

3. EQUITY PLEADING—CONCLUSIONS OF LAW.

It is sometimes necessary and proper in equity pleadings to make deductions from the facts stated that are more or less conclusions of law.

Suit to Enforce the Lien of a Mortgage.

M. W. Feckheimer, for plaintiff.

William H. Holmes, for defendants.

DEADY, J. On November 1, 1871, Thomas Cross, of Salem, Oregon, gave his promissory note to the firm of Allen & Lewis, of Portland, Oregon, for the sum of \$30,000, payable in three years from date, with interest at 10 per centum per annum, payable semi-annually, and to secure the payment of the same he and his wife, Pluma F., on the same day executed and delivered to said firm a mortgage on 15 parcels of land situate in Marion county, and containing in the aggregate about 3,390 acres; and on January 23, 1872, said Thomas Cross gave his promissory note to said firm for the sum of \$10,000, payable in one year from date, with interest at 1 per centum per month, and to secure the payment of the same he and said Pluma F., on the same day, executed and delivered to said firm a second mortgage on the real property aforesaid, together with the south half of block 30 in Salem, and certain parts of lots 1, 2, and 3, in block

20, in said town. On September 16, 1872, said Pluma F. died. On January 22, 1876, said notes being still unpaid, said Thomas Cross and C. M. Cross, his then wife, executed and delivered to C. H. Lewis, a member of said firm, a conveyance, absolute on its face, of all said property subject to said mortgages, but upon the understanding and trust that said Lewis would farm and manage the same, and apply the rents and profits thereof upon the debts secured thereon, and that he might, with the consent of said Thomas Cross, sell and dispose of the whole or any portion of the same and apply the proceeds in like manner. On February 5, 1884, Thomas Cross died, soon after which the notes and mortgages aforesaid were indorsed and assigned by said firm to L. H. Allen, of San Francisco, a member thereof. On August 6, 1884, said Allen brought suit in this court to enforce the lien of said mortgages, alleging that there was then due on the first of said notes \$45,137.04, with interest at 10 per centum per annum from December 22, 1881, and on the second \$10,000, with interest from January 25, 1879, less \$1,686.35 paid thereon. Sundry persons, being the administrators and heirs of Thomas Cross and E. C. Cross, Frank R. Cross and P. May Wilson, the children and heirs of Pluma F. Cross, and C. H. Lewis, are made parties defendant to the bill. On January 20, 1885, an order was made taking the bill for confessed as against all the defendants except E. C. Cross and Frank R. Cross; and on March 10, 1885, they answered the bill; the latter by the former as his guardian.

The answer admits the making of the notes and mortgages, and the amounts due on them, as alleged in the bill, except the amount due on the first note, which is stated at \$45,137.04, with interest on \$30,000 since December 22, 1881, instead of on the larger sum. It also admits the execution of the deed of January 22, 1876, to C. H. Lewis, but denies that it was made on any trust or understanding as alleged in the bill. The answer then states that at and before the execution of the two mortgages, and until her death, Pluma F. Cross was the owner in fee-simple of the two parcels of real property described therein as a portion of the donation of Daniel Leslie, containing 80 acres, and the donation of F. S. Hoyt and wife, containing 131 acres, and otherwise designated in the bill as parcels 14 and 15; that prior to the execution of said mortgages Thomas Cross was indebted to the firm of Allen & Lewis for money theretofore advanced to him in the sum of \$30,000, which he was unable to pay, and to secure the payment of which said notes and mortgages were given; that at the urgent solicitation of her husband and the attorney of said firm, she was induced to join in said mortgage and thus "interpose her said lands as security only for said debt of her said husband." Then follow certain allegations which are excepted to by the plaintiff as impertinent. Briefly they are as follows:

(1) That it was stipulated in said mortgages that in default of payment of the notes, that they should be foreclosed as provided by law, and no other or

different mode of sale of said lands was provided therein or contemplated by the parties thereto. (2) That after the death of said Pluma F. Cross, and in November, 1876, said Thomas Cross entered into an agreement with Allen & Lewis, in pursuance of which they sold and conveyed sundry portions of said mortgaged premises contrary to the terms and conditions of said mortgages, as follows: to J. I. Thompson, 413.06 acres, for \$3,834; to C. C. Kennedy, 160.02 acres, for \$1,680.20; to S. R. Scott, 309.36 acres, for \$3,080; in all 882.44 acres for \$8,594.20, which land was then worth, and would have sold under ordinary circumstances for, \$20,000; that in making said sales said parties expended \$1,500 in surveys, commissions, and agents, and wrongfully charged the same to the proceeds of said sales; that no part of said proceeds were ever credited on said notes or mortgages, and that said sales were made without the consent of the defendants. (3) That the said lands of Pluma F. Cross were, at the time of said sales, and now are, worth not more than \$10,000, and, the premises considered, the same ought to be released and discharged from the operation and effect of said mortgages.

It appearing, from the allegations thus excepted to, that the creditors, Allen & Lewis, voluntarily disposed of a portion of the debtor's property, on which they had a lien for their debt, at a loss or sacrifice of not less than \$10,000, a sum equal to the value of the property which the defendants' mother mortgaged as a security for said debt, they claim that the same is discharged from the operation of the mortgage, and that, therefore, such allegations constitute, as to them, a good defense to the bill.

The argument in support of the exceptions is that, admitting the sale of a portion of the debtor's property at a loss, the conclusion that the property of the surety is therefore released from the effect of the mortgage does not follow, because all the property included in the mortgage is not sufficient to satisfy the debt by more than \$10,000, and therefore it can make no difference to these defendants whether such sum was lost by this disposition of the debtor's property or not. They are not injured in any view of the case, because, after making due allowance for this loss, their property will still be required to satisfy the debt.

It is admitted that Mrs. Cross was only a surety in this transaction for the debt of her husband, and it is not disputed that if the creditors relinquished their lien on any portion of the debtor's property included in the mortgage, without reducing the debt in an amount equal to the value thereof, that the property of the surety is so far a discharge from the lien thereof. This rule is the result of equitable principles inherent in the relation of principal and surety, which require that the property of the former pledged to the creditor for the payment of his debt, shall, for the benefit of the latter, be applied to that purpose. A creditor with such a lien is so far a trustee for all parties concerned, and must not deprive any one of the benefit of it. Upon paying the debt, the surety is subrogated to the right of the creditor in this respect; but if, in the mean time, the latter has done anything to impair the value of such right, the former is so far discharged from his liability. Brandt, Sur. § 370; *Neff's Appeal*, 9

Watts & S. 43; *American Bank v. Baker*, 4 Metc. 177; *Cummings v. Little*, 45 Me. 187; *Hayes v. Ward*, 4 Johns. Ch. 129; *Baker v. Briggs*, 8 Pick. 129.

In *Hayes v. Ward*, *supra*, Chancellor KENT says:

"The surety, by his very character and relation as surety, has an interest that the mortgage taken from the principal debtor should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. A mortgage so taken by the creditor is taken and held in trust, as well for the secondary interest of the surety, as for the more direct and immediate benefit of the creditor; and the latter must do no willful act, either to poison it, in the first instance, or to destroy or cancel it, afterwards."

But it is not stated, either in the bill or answer, what is the value of the portion of the debtor's property still covered by the mortgage, and therefore it does not appear whether or not the whole of it was sufficient, if disposed of at a fair value, to satisfy this debt, without recourse upon the surety property.

In round numbers, there is now due on these notes not less than \$80,000. In the argument for the exceptions, it is claimed that the whole property included in the mortgage is not sufficient to pay the debt by a much larger sum than the alleged value of the defendants' property. And if this is so, then the defendants are not injured by what they complain of, and the allegations excepted to would be no defense to the bill, and be clearly impertinent. But the court cannot say judicially what this 3,390 acres of land is worth. It cannot assume that it is only worth \$70,000, and not \$80,000, though it may not fetch either sum when put up at auction. The rule seems to be that the burden of proof is on the creditor, in a case of this kind, to show that the surety has not been injured by the transaction. *Brandt, Sur. § 370.*

It follows that the allegations excepted to are not impertinent, but constitute a good defense to the relief prayed for as to these defendants. The plaintiff must either deny them by a replication, or confess and avoid them by proper amendments to this bill.

The further point made in support of the third exception, that the matter excepted to is a mere conclusion of law, is not well taken. It is sometimes proper and convenient in equity pleading, as a means of indicating the relief to which the party considers himself entitled, or the defense sought to be made, to make deductions from the facts stated that are more or less conclusions of law; and this seems to be the character of this allegation.

The exceptions are disallowed.

MEYERS and another v. SHURTLEFF.

(Circuit Court, D. Oregon. May 13, 1885.)

DUTIABLE VALUE OF IMPORTED MERCHANDISE—VALUE OF COVERING NOT TO BE INCLUDED THEREIN.

Section 7 of the act of March 3, 1883, (22 St. 523,) not only repeals section 2907 of the Revised Statutes, authorizing the value of the "covering" to be added to the wholesale price of imported merchandise for the purpose of ascertaining its dutiable value, but positively prohibits the value of such "covering" from being estimated as a part of such dutiable value, and therefore the value of barrels in which Portland cement is imported cannot be added to the wholesale price of the latter as an element of its dutiable value.

Action to Recover Excess of Duties Paid to the Collector.

Erasmus D. Shattuck and Robert L. McKee, for plaintiffs.

James F. Watson, for defendant.

DEADY, J. This action is brought by the plaintiffs to recover the sum of \$626.71, alleged to be an excess of duties paid to the defendant as collector of this port. It is stated in the complaint that on September 10, 1884, the plaintiffs imported from London to this port 1,073½ tons of Portland cement, contained in 6,439 barrels, and of the value at London of \$3,133.34; that said "barrels were only coverings or holders, and only the usual and necessary outside packages for the transportation and protection of the cement contained therein, and were and are of no commercial value after the removal of the contents thereof; that said barrels were not of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods, to-wit, cement, to the United States." The complaint then states in detail the entry of the cement at the custom-house, and the valuation of the barrels as a part of the dutiable value of the cement, and the imposition of a duty of 20 per centum thereon, amounting to \$626.71, which the plaintiff, on October 3, 1884, paid under protest, and that said barrels were not dutiable; the subsequent appeal to the secretary of the treasury, and his affirmation of the action of the collector. The defendant demurs to the complaint, for that it does not state facts sufficient to constitute a cause of action.

By the Schedule A of the act of March 3, 1883, (22 St. 493,) "Cement—Roman, Portland, and all others," imported from foreign countries, is made subject to pay a duty of "20 per centum *ad valorem*." The rule prescribed for the government of the collector of customs, in ascertaining the dutiable value of imported merchandise for the purpose of estimating the *ad valorem* duty to be levied thereon, has for the past 20 years, within certain limits, been constantly changing. From the act of July 31, 1789, (1 St. 41,) to that of March 1, 1823, (3 St. 732,) the rule was that the value of "outside packages" should not be considered a part of the cost of the goods. From the latter to

the act of June 30, 1864, (13 St. 217,) the law appears to have been silent on the subject.

By section 16 of the act of August 30, 1842, (5 St. 563,) "the actual market value or wholesale price" of the article imported, "at the time when purchased in the principal markets of the country" from whence imported, together with all costs and charges, except insurance, and including in every case a charge for commissions at the usual rates," is made "the true value at the port where the same may be entered upon which duties shall be assessed."

By section 1 of the act of March 3, 1851, (9 St. 629,) the value of the article is required to be ascertained at "the period of exportation," instead of the "time" of purchase. By section 25 of the act of March 2, 1861, (12 St. 197,) this time is changed to "the day of actual shipment," when the same appears from the bill of lading.

By section 24 of the act of June 30, 1864, (13 St. 217,) "the actual value" of the goods was required to be taken when "on shipboard, at the last place of shipment to the United States;" to be "ascertained by adding to the value of such goods at the place of growth, production, or manufacture, the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind, in which such goods are contained, commission at the usual rate, in no case less than $2\frac{1}{2}$ per centum; brokerage and all export duties; together with all costs and charges paid or incurred for placing said goods on shipboard, and all other charges specified by law.

By section 67 of the act of March 3, 1865, (13 St. 493,) the collector is required "to cause the actual market value or wholesale price" of the goods, "at the period of exportation to the United States in the principal markets of the country" from whence they are imported, "to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed;" and section 24 of the act of 1864, *supra*, is expressly repealed, and also "all acts and parts of acts requiring duties to be assessed upon commissions, brokerage, cost of transportation, shipment, transshipment, and other like costs and charges incurred in placing any goods, wares, or merchandise on shipboard."

By section 9 of the act of July 29, 1866, the pendulum was swung back again to the war tariff of 1864, so that "in determining the dutiable value of merchandise" the collector was required to add "to the cost or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country" from whence the same is imported into the United States, "the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which the shipment was made to the

United States; the value of the sack, box, or covering, of any kind, in which such merchandise is contained; commission at the usual rates, but in no case less than $2\frac{1}{2}$ per centum; brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for exportation and shipment."

These sections of the acts of 1865 and 1866 were carried into the Revised Statutes,—the former being section 2906 of that compilation, and the latter, section 2907. Section 7 of the act of March 3, 1883, (22 St. 523,) repeals the latter of these sections, as well as section 2908, and provides that "hereafter none of the charges imposed by said sections, or any other provision of existing law, shall be estimated in ascertaining the value of goods to be imported; *nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable*: provided, that if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of 100 per centum *ad valorem* upon the actual value of the same."

It is understood that the action of the collector in this case was had in obedience to the instructions of the treasury department, acting under the advice of the department of justice contained in an opinion of January 11, 1884, in which it is said that the only change affected by section 7 of the act of 1883, "as regards the basis on which *ad valorem* duties are to be estimated," "is to exclude from such basis all costs and charges which, under the law as it previously stood, were required to be *added* to the current or actual market value or wholesale price of the merchandise in the principal markets of the country whence the same was imported, or of the country of production or manufacture, as the case might be. Thus the current or actual market value or wholesale price in these markets, which is to be appraised, is now made the *sole basis* for estimating such duties."

The "costs" and "charges" of which these statutes speak, unless otherwise expressly stated, are the items of expense incurred by the importer in and about the purchase of goods, and afterwards, and before their arrival at the port of entry. They do not, unless specially mentioned, include the cost of the sack, box, or covering in which the goods are usually contained and purchased. And it may be admitted that when the statute declares "without more"—without qualification—that the dutiable value of imported merchandise is "the actual market value or wholesale price" in the principal markets of the country whence the same is imported, that such value includes the cost of the sack, box, or covering in which it is usually contained and purchased. *Cobb v. Hamlin*, 3 Cliff. 200. The cost or expense of the covering usual and necessary for the protection and transpor-

tation of an imported article from the place of purchase, is, as a matter of fact, an element of its value at such place. And the only question in this case is whether or not congress has said, without qualification, that the dutiable value of this cement is "the actual value or wholesale price" in London. And, *first*, although the "actual value" of an article in the country where purchased, does, in the abstract, include the cost of the outside package in which it is contained and placed for shipment, yet it is plainly inferable from the terms of the legislation on the subject, as above stated, that whenever congress has intended to include that expense in such value as a basis for estimating duties, it has expressly said so. To go no further back than 1864, that act expressly provided that the "dutiable value" of goods should be their value on shipboard, to be ascertained by *adding* to their value at the place of growth, production, or manufacture, among other things, "the value of the sack, box, or covering of any kind" in which they are contained. The act of 1865 simply made the "dutiable value" of goods their "actual market value" at the period of exportation, and expressly repealed section 24 of the act of 1864, requiring the value of the "covering" to be considered in ascertaining such "market value," while the act of 1866 simply restored the rule of valuation prescribed by the act of 1864.

From this statement of congressional action or legislative habit on this subject, it may fairly be inferred that the expense of the "covering" of imported merchandise is never to be included in ascertaining the "dutiable value" thereof, unless the statute expressly so provides. And therefore, if the act of 1883 did nothing more than repeal section 2907 of the Revised Statutes, (section 9 of the act of 1866,) authorizing the value of such "covering" to be *added* to the "wholesale price," in determining the "dutiable value" of this merchandise, there would be no legislative authority for adding the value of the barrels to the value of the cement, as a basis of estimating the duty on the latter. But when it is considered that the act of 1883 not only repeals section 2907 of the Revised Statutes, authorizing the value of the barrel to be added to that of the cement, but also expressly prohibits the value of the former to "be estimated as a part of the value" of the latter "in determining the amount of duties for which it is liable," the case is too plain for argument. The mere statement of it is sufficient. There is no room for construction or difference of opinion.

The act of 1883 is both explicit and peremptory. It not only prohibits the "charges" or expenses incurred in and about the purchase of the goods and their shipment from being added to their actual value or wholesale price, but it goes further, and, apparently out of abundance of caution, adds: "Nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind, be estimated as part of their [imported goods] value in determining the amount of duties for which they [imported goods] are liable."

The demurrer in this case admits that the value or cost of the bar-

rels in London was estimated in ascertaining the dutiable value of the cement, and that the former is the usual and necessary covering for the protection and transportation of the latter. It is impossible to sustain the legality of this valuation, or the collection of the duties thereon, without absolutely ignoring this prohibitory clause in section 7 of the act of 1883, as seems to have been done in the opinion of July 14, 1884.

The demurrer is overruled.

NORRIS and others v. HASSLER.

(Circuit Court, D. New Jersey. March 12, 1885.)

1. WITNESS FEES—MILEAGE—TRAVELING EXPENSES.

A witness who has been served with a subpoena and received money for traveling expenses cannot refuse to obey such subpoena because the proper amount of mileage has not been paid.

2. SAME—TENDER—CONTEMPT.

In the courts of the United States, witnesses, if they have the means, are obliged to obey the process of the court and attend, whether their fees are advanced or not, and a witness who can pay his expenses and refuses to attend because the money is not tendered him, may be punished for contempt.

3. SAME—EXEMPTION OF WITNESS FROM SERVICE IN OTHER SUIT.

The exemption of a witness or party to a suit from service of process does not extend to service of a subpoena to testify in the same cause on which he is giving attendance.

On Rule to Show Cause, etc.

NIXON, J. Under section 725 of the Revised Statutes, power is conferred upon the courts of the United States to punish for contempts of their authority by fine and imprisonment. The proviso of the section includes within the penalty "disobedience or resistance by any * * * witness to any lawful writ, process, order, rule, decree, or command of the said courts." This authority is exercised by the courts for two purposes: (1) To punish the offender for the disrespect to the court; and (2) to compel his performance of some act or duty required of him by the court which he refuses to perform. See *In re Chiles*, 22 Wall. 168.

Upon affidavits filed, making a *prima facie* case, a rule has been issued in the above cause, and served upon the defendant, requiring him to show cause before the court why he should not be adjudged to be guilty of contempt in not obeying a subpoena *duces tecum*, duly served, to appear before the examiner in Elizabeth on the twenty-fourth of January last. At the hearing two reasons were relied on by the defendant why the rule should not be made absolute: (1) Because the defendant was necessarily absent in New York on the day on which the subpoena required his attendance here; (2) because the subpoena was not legally served.

1. The proofs do not show a necessary and unavoidable absence, but one voluntarily assented to by the defendant as a pretext and excuse for not obeying the writ. It is true that he was engaged as a party and witness before a referee in the city of New York on the day of the return of the subpoena requiring his attendance at Elizabeth; but all the evidence contradicts the allegation that he was necessarily there. If he had manifested the slightest desire to obey the writ, the hearing in New York could have been arranged by him so that obedience would have been not only possible, but easy.

2. Two grounds were assigned why there was no legal service of the subpoena. The first is that the full amount of witness fees was not paid. The counsel for the complainants testifies that before the subpoena was served upon the defendant he examined the New Jersey Atlas, prepared by Beers, Comstock & Kline, and measured the distance from Elizabeth to Jersey City, and from Jersey City to Englewood, the residence of the defendant, and ascertained that the distance from Elizabeth to Jersey City was 12 miles, and from Jersey City to Englewood 13 miles. He then handed to the witness the sum of \$4,—\$1.50 for fees and \$2.50 for mileage, being 10 cents per mile for going and returning the 25 miles. But there seems to be a distance of about one mile between the two railroad stations at Jersey City which the sum paid did not cover.

Several suggestions might be made in reply: (a) The shortage in the payment of mileage was so small that the maxim "*de minimis non curat lex*" is fairly applicable. (b) The defendant accepted and receipted for the \$4 without the intimation of any objection as to the amount, and it may be fairly inferred from such action that the excess was waived. See *Andrews v. Andrews*, 2 Johns. Cas. 109. (c) The defendant had then in his pocket \$1.50 of the complainants' money which had been paid to him on the service of another subpoena to testify on that day on behalf of the complainants, and which had been superseded by the *subpoena duces tecum*. It is a reasonable suggestion that if a gentleman should retain money paid to him for a service which was not performed, he should be willing to apply it on account of another service, substituted for the first. But, apart from these considerations, it has been held that, in the courts of the United States, witnesses, if they have the means, are obliged to obey the process of the court, and attend, whether the fees are advanced or not. In such a case, Judge DRUMMOND says: "An attachment would issue, and the court would punish a man who could pay his expenses and would not come because the money was not tendered." *U. S. v. Durling*, 4 Biss. 510. The defendant has not put his non-obedience to the writ on the ground of not having the means to pay the expenses of travel.

The second ground is that the subpoena was served while the defendant was attending before the examiner as a party to the pending litigation. It is undoubtedly now the established law that parties

and witnesses are not only privileged from arrest on civil process, but also from the service of summons in civil actions, while attending court. The propriety of such a rule for witnesses is clear. They are compelled to attend by virtue of the process of the court, and the court feels under obligation to protect them, not only while attending, but in going and returning. My attention, however, has not been called to a case, nor do I think that one exists, where such an exemption has been extended to the service of a subpoena to testify in the cause on which they are giving attendance; and it does not come within the reason of the rule. There are a number of cases in the reports where proceedings for attachment against witnesses have been taken for their refusal to obey the process of subpoena, served in the very presence of the court; but in none of them has the suggestion been made that such a service was unlawful. See *Jupp v. Andrews*, Cowp. 845; *Pitcher v. King*, 2 Dowl. & L. 755; *Bowles v. Johnson*, 1 W. Bl. 36. That a party to a suit can be compelled by a subpoena *duces tecum* to produce papers and documents to be used in the trial as evidence is no longer an open question. *Murray v. Elston*, 23 N. J. Eq. 212.

All the reasons assigned by the defendant for not obeying the writ and producing the papers required rather aggravate than excuse or justify his refusal. The rule must be absolute. As the object of the proceeding is to compel the defendant to perform an act or duty which appears to be within his power, the judgment to be entered will be largely controlled by his conduct hereafter.

In re BROCKWAY, a Bankrupt.

(Circuit Court, S. D. New York. September 13, 1882.)

BANKRUPTCY—REFUSAL OF DISCHARGE—SECOND APPLICATION—EVIDENCE—RES ADJUDICATA—AMENDATORY ACT OF JULY 26, 1876.

A bankrupt having applied for his discharge, it was denied by the district court, because his application was not made within one year from the date of adjudication of bankruptcy. Specifications opposing the discharge had been filed by creditors, including, among other grounds of objection, that the bankrupt had not kept proper books of account, and proofs were taken upon the issue, but were not considered by the court. Subsequently, and after the passage of the act of July 26, 1876, allowing an application for discharge to be made "at any time after the expiration of 60 days, and before the final disposition of the cause," the bankrupt made a second application for discharge in the same proceeding, which was opposed by the same creditors upon the same specifications, together with additional grounds of opposition. The proofs taken on the first application were used by the opposing creditors upon the second application, and by these proofs alone it was made to appear that the bankrupt had not kept proper books of account, and on that ground the discharge was denied. *Held*, on appeal to the circuit court, (1) that the proofs taken on the former application were competent; (2) that the former decision, denying the discharge, was conclusive between the bankrupt and his creditors, and a bar to the second application; (3) and that the subsequent amendment of the bankrupt act did not impair or affect the controlling force of the previous adjudication.

Bankruptcy Appeal. For decision of district court see 12 FED. REP. 69.

M. H. Regensberger, for petitioner.

A. C. Brown, for opposing creditors.

WALLACE, J. The bankrupt having applied for his discharge, it was denied by the district court, because his application was not made within one year from the date of the adjudication of bankruptcy. Specifications opposing the discharge had been filed by creditors, including, among other grounds of objection, that the bankrupt had not kept proper books of account, and proofs were taken upon the issue; but these proofs were not considered by the court, it having been held that the application was too late. Subsequently, by the act of July 26, 1876, (19 St. at Large, 102,) the section of the bankrupt act (section 5108, Rev. St.) requiring the application for discharge to be made within a year, having been amended so that it could be made "at any time after the expiration of sixty days, and before the final disposition of the cause," the bankrupt made a second application for discharge in the same proceeding. The discharge was opposed by the same creditors, upon the same specifications, together with additional grounds of opposition. The district court denied the discharge, because the bankrupt had not kept proper books of account. 12 FED. REP. 69. The proofs taken upon the first application were used by the opposing creditors upon the second application, and it was by these proofs alone that it was made to appear that proper books of account had not been kept by the bankrupt. The learned district judge held that, the issue being the same, the parties the same, and the proceeding for a discharge being in the same bankruptcy, the proofs taken upon the former application were competent. It is now urged by the bankrupt that this conclusion was erroneous.

Treating both applications as in substance one proceeding, there is no reason why the depositions used on the first occasion should not be competent upon the second. Unless the second application is to be deemed a rehearing of the original application, the bankrupt is finally precluded from obtaining his discharge. Upon a rehearing, the proofs originally taken are always admissible. Daniell, Ch. Pr. c. 32, § 2.

But I am constrained to hold that the order denying the discharge made upon the first application is a fatal obstacle in the way of any discharge. The order was, in effect, a final adjudication adverse to the right of the bankrupt to a discharge. So long as it remains in force, it is conclusive between the bankrupt and his creditors. It matters not that it was termed an order instead of a decree. *Dwight v. St. John*, 25 N. Y. 203. It was a decision upon the merits of the controversy, because it proceeded upon the ground that the bankrupt had not complied with a condition of the bankrupt act which was vital and imperative, if not jurisdictional. *Re Wilmott*, 2 N. B. R.

214; *Re Martin*, 2 N. B. R. 548; *Re Sloan*, 12 N. B. R. 59. Undoubtedly that decision would not preclude a new bankruptcy proceeding, nor, probably, a discharge in such proceeding, if the bankrupt could have shown himself entitled to one. *Re Farrell*, 5 N. B. R. 125; *Re Drisko*, 13 N. B. R. 112, and 14 N. B. R. 551. For the purposes of the present bankruptcy that decision must be deemed *res adjudicata*, that the bankrupt is not entitled to a discharge, because he has not complied with a condition essential to his right. It was a condition which could not be waived by a creditor, and which the court was bound to consider as a prerequisite to a discharge.

The subsequent amendment of the bankrupt act did not impair or affect the controlling force of the previous adjudication. Assuming, what may well be controverted, that the amendment may be given such retroactive effect as to authorize an application for a discharge in a pending proceeding, although the year from the date of the adjudication of bankruptcy had expired, it certainly cannot operate retroactively to overthrow a prior judgment. A retrospective construction to a statute is never favored; neither will it be inferred that congress intended to exercise a doubtful power. It is, at least, doubtful whether the act would be within the legislative competency, if intended to effect such a result. *State of Pennsylvania v. Wheeling Bridge*, 18 How. 421.

The order of the district court is affirmed.

UNITED STATES v. LANDSBERG.

(Circuit Court, S. D. New York. December 22, 1882.)

CRIMINAL LAW AND PROCEDURE—PERJURY—MATERIAL MATTER—REV. ST. § 5392
—CROSS-EXAMINATION BEFORE UNITED STATES COMMISSIONER.

Where a party charged with counterfeiting, on examination before a United States commissioner, testifies, on cross-examination, in answer to a question, that he has never been in prison, when he has been in a state prison, such false answer amounts to "material matter," within the meaning of Rev. St. § 5392, and an indictment for perjury will lie.

Motion for New Trial and in Arrest of Judgment.

J. G. Agar, Asst. U. S. Dist. Atty., for the United States.

R. N. Waite, for defendant.

Before WALLACE, BENEDICT, and BROWN, JJ.

BENEDICT, J. The accused, having been convicted of perjury, now moves for a new trial and in arrest of judgment. The principal question presented for determination is whether the crime of perjury was committed by the accused when he made the false statement, under oath, which is set forth in the indictment. This statement was made under the following circumstances, as shown at the trial: The ac-

cused had been arrested by virtue of a commissioner's warrant; upon a charge of having uttered counterfeit coin. He demanded an examination, and, upon such examination, duly held before the commissioner, he offered himself as a witness in his own behalf, and was duly sworn as such. Upon his cross-examination, in answer to a question put without objection, he testified that he had not been in prison in this state, or any other state, when the fact was that he had been imprisoned in the state prison of this state, and also in the state prison of New Jersey. Thereafter, the present indictment was found against him, in which the perjury assigned is the testifying, under the circumstances above stated, that he never was in prison in this state, or any other state.

On the part of the accused the point made is that the false matter so stated by the accused before the commissioner was not material matter, within the meaning of the statute, and therefore the crime created by the statute was not committed.

An essential element of the offense created by the statute (section 5392, Rev. St.) is the materiality of the matter charged to have been falsely stated. The words employed in the statute are "material matter." These words were, doubtless, adopted from the common law, and they must be given a signification broad enough to cover, at least, cases of perjury at common law. The rule of the common law in regard to perjury is thus stated by Archbold: "Every question in cross-examination, which goes to the witness' credit, is material for this purpose." Archb. Crim. Pl. & Proc. 817, (Eng. Ed.) The same rule was declared by the twelve judges in *Reg. v. Gibbons*, 9 Cox, C. C. 105.

The inquiry here, therefore, is whether the imprisonment of the accused in this state and in New Jersey was calculated to injure his character and so to impeach his credit as a witness; for it is not to be doubted that when the accused offered himself as a witness, he placed himself upon the same footing as any other witness, and was liable to be impeached in the same manner. Upon this question our opinion is that the matter stated by the accused as a witness had an obvious bearing upon the character of the witness, and could properly be considered by the commissioner in determining what credit was to be given to the testimony of the witness in respect to the crime with which he stood charged. In *Reg. v. Lavey*, 3 Car. & K. 26, the accused, when a witness, had falsely sworn that she had never been tried in the Central criminal court, and had never been in custody at the Thames police station. On her trial for perjury these statements were ruled to be material matter, and the conviction was sustained. In *Com. v. Bonner*, 97 Mass. 587, a witness had been asked "if he had been in the house of correction for any crime." Objection to the question on the ground that the record was the best evidence was waived, and the case turned upon the materiality of the question. The matter was held to be material. The present case is

stronger, for here no objection whatever was interposed to the inquiry respecting the imprisonment of the accused. Having made no objection to the inquiry, and gained all the advantages to be secured by his false statement, it may perhaps be that it does not lie in his mouth now to say that his statement was not material. See *Reg. v. Gibbons, supra*; *Reg. v. Mullany, Leigh & C.* 593. But, however this may be, it is our opinion that the statement he made was material matter, within the meaning of the statute, because calculated to affect his credit as a witness.

The other points discussed have received our attention, and are thought to be untenable. They are not such as require attention in this opinion. The motions are denied.

HARTFORD WOVEN-WIRE MATTRESS CO. v. PEERLESS WIRE MATTRESS CO.

Circuit Court, D. Connecticut. April 14, 1885.)

1. PATENTS FOR INVENTIONS—WIRE MATTRESSES—FARNHAM PATENT—REISSUE No. 7,704—NOVELTY.

Reissued patent No. 7,704, granted to the Hartford Woven-wire Mattress Company, as assignee of John M. Farnham, for an improvement in bedstead frames, on May 29, 1877, *held* not void for want of novelty, and infringed by defendants.

2. SAME—PERKINS PATENT No. 109,446.

Patent No. 109,446, granted George C. Perkins for an improvement in woven-wire fabrics for mattresses, dated November 30, 1869, *held* void for want of invention.

In Equity.

Charles E. Perkins, for plaintiff.

Wm. Edgar Simonds, for defendant.

SHIPMAN, J. This is a bill in equity to restrain the alleged infringement of reissued letters patent No. 7,704, granted May 29, 1877, to the plaintiff, as assignee of John M. Farnham, for an improvement in bedstead frames, and also of letters patent No. 109,446, granted November 22, 1870, to George C. Perkins for an improvement in woven-wire fabrics for mattresses. The original Farnham patent was dated November 30, 1869. The description of the Farnham invention, as given in the original and reissued specifications, is contained in the opinion of this court in *Woven-wire Mattress Co. v. Wire-web Bed Co.* 8 FED. REP. 87.

The four claims of the reissue are as follows:

“(1) The combination of the side-bars and end-bars, and elastic coiled wire fabric, D, attached only to the end-bars, with the end-bars of the frame elevated above the side-bars, so that the fabric will be suspended above the side-bars from end to end of the frame. (2) The combination in a removable bed-

bottom, or bedstead frame, of the side-bars, A, standards or corner pieces, B, end-bars, C, and the elastic fabric, D, combined and arranged substantially as and for the purpose specified. (3) The inclined double end-bar, C, of the bedstead frame, arranged substantially as and for the purpose herein shown and described. (4) The standards, B, constructed as described, arranged longitudinally adjustable on the side-bars of a bedstead frame, to permit the inclined end-bars to be set a suitable distance apart, as set forth."

The third and fourth claims are substantially identical with the two claims of the original patent.

The object of the invention was to provide a frame by means of which the elastic, woven-wire fabric, which is the subject of letters patent to Franz Rudolph Wegman, dated March 6, 1866, could be conveniently and securely held. The invention consisted in clamping the two ends, only, of the fabric between double inclined end-bars, so that the entire strain of the weight upon the bed-bottom being lengthwise rather than crosswise, and in the direction of the greatest elasticity of the fabric, will also come upon the edge only of the end-bars; and further consisted in connecting the side-bars and end-bars by longitudinally adjustable standards, or corner pieces, which would permit the inclosed end-bars to be adjusted so as to stretch the fabric, if desired.

The object of the first claim of the reissue was to enlarge the patent so that inclined end-bars need not be indispensable, but that the invention should be made to consist, so far as these bars are concerned, in end-bars elevated above the side-bars. The elevation necessarily results from the method in which the frame is constructed, but the feature of the invention which was a novelty, and which gave to the first claim of the original patent its value, was the inclined end-bars. So also the words "attached only to the end-bars," are an undue enlargement of the original patent, if the invention is permitted to depend upon that feature. At the same time that feature is a part of the structure which indispensably belongs to it, and which the drawings exhibited, and when the claim is limited, as it must be, to double inclined end-bars, there is no expansion of the original patent. It is a matter of common knowledge that the fabric was always attached only to the end-bars, in the sense that it was supported entirely by those bars. The curtain or fringe, which sometimes hung from the end-rails to the side-rails as an ornament or finish, never was attached to the side-bars so as to have any "pull" upon them.

The intent of the second claim of the original patent was to eliminate the inclination of the end-bars and the longitudinal adjustment of the standards from the description of the invention; but the claim must be construed to require both those features, or their manifest equivalents, known to be such at the date of the invention. While protesting against this construction of the first and second claims, the learned counsel for the defendant admits that it leaves to them life and validity.

The novelty of the first and third claims was considered and sus-

tained in the *Wire-web Bed Case*, 8 FED. REP. 87, and by Judge BLODGETT in *Whittlesey v. Ames*, 13 FED. REP. 895. The infringement of those claims can hardly be doubted, after the testimony of the president of the defendant corporation, who admits that his company sold frames with inclined end-rails, though he denies that they were intentionally made so as to infringe. The standards of the second and fourth claims are thus described in the specification of the reissue:

"To the ends of each side-bar are secured, by means of bolts, *a, a*, upward projecting standards, *B, B*, made of metal or other suitable material. These bolts pass through short longitudinal slots in the standards, whereby the latter may be adjusted to stretch the cloth when desired. These standards are grooved or have ribs on their inner sides by which the ends of the end-bars, *C, C*, are held. The end-bars connect the side-bars and their standards with each other. * * * The end-bars are held in inclined positions, as shown in Fig. 1, by the ribs or grooves in the standards, and are held in place by means of screws, *c*, which are fitted through the standards, or by other equivalent devices."

These standards are upwardly projecting iron chairs, to which the end-bars are fastened and in which they rest, and which are secured to the side-bars by bolts passing through slots, and thus the side-bars are longitudinally adjustable so that the end-bars may be moved to tighten the fabric. It is plain, the elastic bed-bottom being suspended entirely from the end-bars, that a great strain will come upon them, and that each bar must be firmly secured to each of its neighbors. This necessity calls for a standard or support which shall bind the bars together, so that the strain shall not move them, and yet it must be capable of adjustment, so that the fabric may be tightened or loosened, if need be.

The novelty of the standard is attacked by letters patent No. 26,575, granted to A. M. Dye, December 27, 1859. The object of his invention was "to obtain a facile mode of straining or tightening the webbing of the [bed] bottom," and consisted in attaching the end-bars to the side-bars by means of dovetailed projections upon the bottom of the end-bars, which slide in dovetailed slots cut in the tops of the side-bars, and by a screw-bolt which passes through a hole in the dovetailed projection and beyond it into the slot, and is held firm by a nut which presses against the projection. This is a method of fastening the side-bars and end-bars together, and of longitudinal adjustment of the side-bars for the purpose of tightening the webbing, but is a very different thing from the longitudinally adjustable standard of Farnham, which rigidly binds end-bars and side-bars together. The Dye arrangement has no standard. On the contrary, the end-bar slides in a slot in the side-bar. The two systems are upon a different principle.

The defendant uses the Farnham standard without a slot in the standard, but it is made longitudinally adjustable on the side-rail in the following way: A slot is made in the rail into which a projection on the inside of the standard enters; a screw bolt runs longitudinally

through this projection and holds the side-bar firmly in its place, and is capable also of adjusting the side-bars relatively to the end-bars.

In the plaintiff's device the slots are in the standard, and the bolts pass laterally through the slots. In the defendant's device the slot is in the rail, and the bolt passes longitudinally through the slot. In each case the standard is longitudinally adjustable on the side-rails for the purpose of permitting the end-bars to be set at a suitable distance apart.

The change in the location of the slot makes it necessary that the screw which holds the rail and the standard together should move longitudinally instead of laterally. Thus far there is no change in function; there is merely a mechanical change in the form and arrangement of the parts. In the defendant's device the screw is of itself available in stretching the fabric, whereas in the plaintiff's device the fabric must be stretched by some force extrinsic to the standard, and the screws hold it after it is stretched. The defendant has thus obtained an effect additional to the one theretofore produced, but, having taken the Farnham standard and all its beneficial results, the infringement is not mitigated because another result has been super-added.

The Perkins patent was for an improvement upon the Wegman patent of March 6, 1865. The Wegman invention consisted "in constructing a mattress of spiral wire springs, linked or braided together and stretched upon a frame. * * * The springs are made of steel or other wire, wound into a spiral form by proper machinery, and linked together so that each convolution of the spring passes through two or more of the adjoining springs." The patentee also said that the spiral wire springs will ordinarily be arranged double, that is, consisting of two series of springs interwoven together, but that a greater number of spirals can be linked together to give greater strength and stiffness to the web. The Perkins invention is said in the specifications of the patent to consist "in forming cords of several spiral metallic springs in parallel coils wound together in the manner hereinafter described, and also in weaving them into a woven-wire fabric of any of the usual forms made of coiled wire for the purpose of stiffening such portions as may be necessary. Condensing somewhat the language of the specifications, "the spiral wheels from the cords are woven or coiled together, so that the convolutions of one wire lie close to and parallel to the next. The cords can be formed by introducing the end of each coil separately at one end of the cord and turning it through to the other end." In mattresses these cords are placed near the edge, and are also placed at distances apart through the fabric so as to give it the desired stiffness.

From the quotation which has been given from the Wegner patent, from the history of the improvement as detailed by the witnesses, and from inspection of the article itself, it appears that the improvement was not an invention, but was a matter of ready mechanical adjust-

ment. The recent decisions of the supreme court are emphatic in demanding for a patentable invention more than the novelty and utility which may be expected to result from the special knowledge and intelligent skill of the mechanic in the branch to which the invention belongs. *Hollister v. Benedict Manuf'g Co.* 113 U. S. 59; S. C. 5 Sup. Ct. Rep. 717; *Thompson v. Boisselier*, 5 Sup. Ct. Rep. 1042.

Let there be a decree for an injunction and an accounting with respect to the Farnham patent, and for a dismissal of so much of the bill as relates to the Perkins patent. The costs pertaining to each issue are to be taxed in favor of the successful party, but the excess only of one over the other is to be paid.

MUNDY v. KENDALL and others.

(Circuit Court, D. New Jersey. March 16, 1885.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—LACHES.

Where a patentee has known of infringement by a party of his patent, and acquiesced therein for a considerable length of time, a preliminary injunction will not be granted, without an explanation of such acquiescence.

NIXON, J. This is a motion for a preliminary injunction against the infringement of reissued letters patent No. 2,289, and is resisted by the defendants on the ground that the mechanism used by them does not infringe the complainant's invention. The original patent was numbered 158,967, dated January 19, 1875, and was granted to the complainant for improvement in friction-drums. This was surrendered and canceled, and the reissue was granted July 13, 1880, on amended specifications. Three new claims were added to the reissue, and the single claim of the original patent was retained. The bill of complaint only alleges the infringement of that claim.

The question, on this motion, lies in a very narrow compass. The validity of the patent has been sustained, and the claim construed by Judge WHEELER, in *Mundy v. Lidgerwood Manuf'g Co.* 20 FED. REP. 114. In deciding the motion, I shall deem the patent valid, and accept the construction given to it by the learned judge in that case. The invention relates to new and useful improvements in friction-drums for pile-drivers and hoisting-machines, and is said in the specifications "to consist in making the friction surface of the drum of pieces of wood confined endwise in a shell formed on the inner side of the gear-wheel; such pieces of wood being dove-tailed in, and turned at an angle of 30 to 40 degrees, to fit within a conically recessed disk on the drum." The claim is for a combination as follows:

"(4) The combination of a tubular and sliding drum, A, loose on a shaft, G, and a friction-cone, D, of the fast-driven spur-wheel, E, having spring,

P, to repel the said cone, and provided with a side flange supporting the cone, N, as and for the purpose described."

It contains six elements: (1) a drum; (2) a shaft; (3) friction-cone; (4) a spur-wheel; (5) a spring; and (6) a side flange. The harmonious connection of these parts in an organized mechanism constitutes the complainant's friction-drum; and the proofs show that its addition to a hoisting-engine has been found so useful, and its use so popular in the trade, that it has become quite difficult to sell a hoisting-engine unless it is supplied with a friction-drum containing the essential features of the complainant's invention. The machine of the defendants which is alleged to infringe has substantially the same organization. It has the tubular and sliding drum; the shaft in which the drum runs loose; a friction-cone; a driving-wheel fastened to the shaft; springs to regulate the pressure between the friction surfaces, and to throw the parts out of connection with promptness when required; and a side flange to support the friction surface. The differences are that the friction surface of the complainant's patent is wood, and that of the defendant's, leather; that the complainant has one spring to regulate the pressure, and the defendant, two; that in the complainant's machine the bearing of the friction surface is between the inner face of the drum-flange and the outer face of the friction-cone, while in the defendant's it is between the outer face of the drum-flange and the inner face of the friction-cone. But these changes are merely mechanical, or the substitution of well-known equivalents.

I should have no doubt about the propriety of issuing the injunction if it was not so plainly to be inferred from the complainant's affidavits that he has been familiar with the defendant's infringement, and has assigned no reason why he has not proceeded more promptly in stopping it. The affidavits nowhere disclose when he first had knowledge. A patentee need not expect to obtain a preliminary injunction in this district where he has known of the defendant's infringement, and has acquiesced in the same for any length of time, without first explaining the reason for his acquiescence. As this matter was not adverted to, by the counsel on either side, at the hearing, I will give the parties 10 days in which to supply affidavits on the subject of the knowledge and acquiescence of the complainant in this regard. When these affidavits are put in, I will determine whether an injunction should be ordered or refused, or whether the proper relief will not be an order that the defendants give a bond, with satisfactory security, for the payment of all damages which may arise for infringement after the date of this application if the complainant's patent shall be sustained in final hearing.

RAILWAY REGISTER MANUF'G CO. v. NORTH HUDSON C. R. CO.
and others.*(Circuit Court, D. New Jersey. February 3, 1885.)*

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DEFENSE OF IRREGULAR ISSUE BY PATENT-OFFICE.

In a suit for infringement a patent cannot be invalidated by showing that the requirements of the statute, to be observed by the commissioner of patents in order to its issue, have not been regarded.

2. SAME—DURATION OF PATENT—IMPROPER ISSUE—FOREIGN PATENT.

Where letters patent have been issued by the patent-office for a period of less than 17 years, because of a reference to a supposed foreign patent, and the inventor has refused to accept them, and on further examination such letters are canceled and a new patent issued, the time intervening between the issue and allowance of the patent should not be deducted from the term of the patent, but the patentee be allowed to enjoy his monopoly for the full term of 17 years.

In Equity.

NIXON, J. When the above case came up for final hearing, the counsel for the defendants raised two preliminary questions, which were supposed to be decisive, and which, if ruled in favor of the defendants, would relieve the court from the duty of considering the controversy upon its merits. The two questions were (1) whether the complainant's patent was not invalid because no written specifications and claim were, in fact, signed by the inventor, nor was his signature attested by two witnesses, as required by the statute, before the letters patent could be issued; (2) whether the letters patent were not void because issued for a greater length of time than the statute allowed. The court considered these matters of sufficient gravity and importance to request the counsel of the parties, on a preliminary argument, to confine themselves to their discussion.

1. The facts in regard to the first question are these: On the twenty-ninth of December, 1877, John B. Benton, the inventor, made application in writing to the patent-office for letters patent for "improvement in fare registers." It consisted of a petition, oath, specification, and six claims, appointing C. C. Beaman, Jr., Esq., his attorney, with full power of substitution and revocation, to prosecute the application, and to make alterations and amendments therein. The specification was signed by the applicant and attested by two witnesses, and was verified by the oath of the patentee that he was the original and first inventor. On the third of January, 1878, the patent-office gave notice that the first, second, third, and sixth claims were rejected, having been anticipated by other patents. Matters thus stood till February 10, 1879, when Mr. Beaman gave notice to the commissioner of patents, to associate with him Messrs. Baldwin, Hopkins, and Peyton, as attorneys in the case. On the twenty-ninth of March following, the patent-office, at the request of Baldwin, Hopkins, and Peyton, erased the entire specification before filed, except the signatures,

and in lieu thereof, inserted new specifications and claims. These new specifications were not signed by Benton nor attested by any witnesses. They were a substitute for the former, at the request of the attorneys, and contained 16 instead of 6 claims.

Owing to suggestions of anticipation made to the attorney of the applicant, the third, fourth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth claims were erased on May 19, 1879, and the first, third, fourth, and fifth, as re-numbered, on the seventh of August following. Other changes were made; and on August 20, 1879, the commissioner of patents declared a preliminary interference with a pending application of Fowler and Lewis, filed April 2, 1879, as to the first, second, and third claims, as they then stood. These three claims were again amended November 20, 1879, the first interference dissolved; and on the eighteenth of December following a second interference was declared upon the amended claims. After being involved for some time in the technicalities of the patent-office, Lewis and Fowler seem to have withdrawn from the interference proceedings, and the complainant had the patent of its assignor, Benton, allowed with the then claims as last amended; which, it is alleged by the complainant, were merely a fuller restatement of the invention claimed by Benton in the fifth claim of his original application. The defendants, on the other hand, insist that they are for an entirely different invention. Upon this important question in the suit, I shall express no opinion until it is more fully presented and argued by the respective parties.

Outside of that question, I do not find any irregularity in the method of procedure which authorizes me to declare the patent void. There is a long list of cases holding that patents cannot be invalidated by proving that the requirements of the statute to be observed by the commissioner in order to their issue have not been regarded. Section 4920 of the Revised Statutes enumerate the five special defenses which may be pleaded in a suit for infringement. If congress had intended that the validity of patents might be assailed collaterally for other reasons, it would have said so in explicit terms. The only defenses set up in the answer in this case are (1) that Benton was not the original and first inventor of the alleged invention in the complainant's patent; (2) that the matters and things patented had been in prior use more than two years before the time when the application for the letters patent was made; (3) non-infringement; and (4) that the fare registers used by the defendants are embodied and contained in certain letters patent granted to Lewis and Fowler. No suggestion is made that the patent is void for fraud or irregularity in obtaining it. The supreme court in *Rubber Co. v. Goodyear*, 9 Wall. 797, held that congress did not mean a patent to be abrogated collaterally, but had left the remedy, in such a case, to be regulated by the principles of general jurisprudence, quoting with approbation the remark of Chancellor KENT, in *Jackson v. Lawton*, 10 Johns. 23,

that "unless letters patent are absolutely void on the face of them, or the issuing of them was without authority, or was prohibited by statute, they can only be avoided in a regular course of pleading, in which the fraud, irregularity, or mistake is regularly put in issue." In the recent case of *Giant Powder Co. v. Safety Nitro Powder Co.* 19 FED. REP. 511, Judge SAWYER says that the supreme court has over and over again affirmed the principle that "all questions of fact behind the patent are to be examined, heard, and conclusively determined by the commissioner of patents." See, also, on this point, Curt. Pat. § 274; *Hartshorn v. Eagle Shade Roller Co.* 18 FED. REP. 91, and cases there cited; *Crompton v. Belknap Mills*, 3 Fisher, 541; *Mowry v. Whitney*, 14 Wall. 434.

2. The second question may be disposed of in fewer words. On the argument I was inclined to the opinion that the complainants' patent must be reckoned void because it was practically granted for a longer term than the law allowed, but on careful examination of the facts I am not sure that this is a correct view of the transaction. It appears that while the proceedings for the patent were pending an English patent, granted to one Towle, dated November 2, 1877, was introduced into the case, not to show that the inventor, Benton, had patented the invention abroad, but to prove its non-patentability here by reason of the anticipation there. Benton met the reference; and from the fact that a patent was granted to him, it is presumed he satisfied the proper officers of the department that the date of his invention was anterior to the date of the English patent. This claim was allowed July 24th, and the letters patent were issued August 17, 1880. It does not appear when the patentee received them; but, on the fifth of October following, these letters patent, as granted, were returned to the office, with the statement of the solicitors that they had not been and could not be accepted by the inventor because not issued for 17 years, as the law authorized and required. It seems that before forwarding them some of the officers of the patent-office had printed over the specification the words "Patented in England, November 2, 1877." The legal effect of such an indorsement was to limit the life of the patent, as issued, to the period which the English patent had to run. It is conceded that this was a mistake, and that the patent-office had inadvertently assumed that the Towle English patent had been proved to have been obtained by or in the interest of Benton.

The commissioner of patents at once ordered the letters patent numbered 231,207 "to be returned to the original files of the application and to be canceled, and that letters patent in due form for the invention therein described be issued to John B. Benton, pursuant to his petition and the record in the case. The cancellation followed and letters patent No. 233,915, and dated November 2, 1880, were issued for the full period of 17 years from their date. If the first patent had been accepted by the patentee and he had brought suit

upon it against infringers, or had claimed any privileges or exercised any rights of ownership under it, a grave question would arise whether afterwards the commissioner had any power to make any change, except by surrender and reissue under the provisions of section 4916 of the Revised Statutes; but he did nothing of the sort. Under the patent law the invention and the government were parties to a contract, and when the officers of the government said to him in effect, "Accept of a monopoly of your invention for a less period than seventeen years," he had a right to reply, "No; I repudiate such a contract; give to me what the law allows." And when it is given to him, the time intervening between the issue and allowance of his patent should not be deducted from the term of the patent unless he has derived some advantage therefrom. He will only enjoy his monopoly for the 17 years. If the complainant should have a decree for infringement, damages and profits will only be allowed, on the accounting, from the date of patent.

The case must be heard upon the merits.

NOTE.—Since preparing the foregoing opinion my attention has been called to the recent decision of the supreme court in *Mahn v. Harwood*, 5 Sup. Ct. Rep. 174. I have examined the case with care, and do not find anything therein which affects or controverts the reasoning and conclusions in the above case.

NEW YORK BELTING & PACKING CO. v. MAGOWAN and others.

(Circuit Court, D. New Jersey. December 10, 1884.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—WANT OF NOVELTY.

The novelty of the patent being in doubt, the application for a preliminary injunction is refused, on condition that defendants execute a bond to secure complainant on the accounting, if, upon final hearing, the patent is sustained, although the infringement is clearly shown.

On Motion for Preliminary Injunction.

NIXON, J. This is an application for a preliminary injunction. I have no difficulty on the question of infringement. The exhibits of the defendants' manufacture, both in 1882 and 1884, show quite clearly, to my mind, that they are infringements of the complainant's patent. But the evidence of the defendants, and especially the affidavits of the expert, Weigand, throw some doubt on its novelty. Under the circumstances, I regard it as a proper case in which to refuse an injunction, if the defendants will execute a bond to secure the complainant on the accounting, if, upon final hearing, there shall be a decree sustaining the validity of the patent. The injunction is therefore withheld, provided that the defendants, within 10 days,

shall file a bond to the complainant corporation, in the penal sum of \$10,000, conditioned for the payment of profits and damages for all subsequent infringement, if the patent shall be finally sustained; the bond to be approved by the clerk, and the defendants to file an account, under oath, every 60 days, of the rubber manufactured and sold by them, of the kind and character shown in the exhibits.

THE ALASKA and her Cargo.¹

(District Court, S. D. New York. April 17, 1885.)

1. SALVAGE—RUDDERLESS STEAMER.

The steamer Alaska, of the Guion line, while on one of her regular voyages from Liverpool to New York, encountered heavy weather, and when she was some 600 miles from New York, her rudder was found to be broken and unserviceable. She accordingly lay to, while her captain exhibited signals of distress, and attempted various expedients for steering her, none of which proved available. At the end of two days the steamer Lake Winnipeg, of the Beaver line, observed the signals and came to her assistance. At an interview between the captains of the two steamers, it was agreed that the captain of the Lake Winnipeg should assist the Alaska to New York by allowing herself to be towed and to serve as a rudder for the Alaska, which was the faster steamer. Chains were passed from each stern-quarter of the Alaska to the bows of the Lake Winnipeg, distant some 90 fathoms, in such a manner that the Lake Winnipeg, by altering the direction of her bow, would slue the stern of the Alaska to one side or the other, and thus keep her head pointed in the required direction. The vessels proceeded in this way to New York, with the exception of some 149 miles, which the Alaska during 18 hours of one day ran alone, keeping in the desired direction by means of her sails. On the fourth day they arrived in New York; and on the day after arrival, and without making a previous demand, the owner of the Lake Winnipeg filed a libel for salvage. The Alaska, with her cargo and freight, was valued at \$1,041,542, while the Lake Winnipeg, her cargo and freight, were worth between \$325,000 and \$350,000. *Held*, that \$26,039, or 2½ per cent. of the value of the Alaska, and cargo was a proper salvage award. *The Great Eastern*, 3 Moore, P. C. (N. S.) 31. The facts of her salvage case stated.

2. SAME—AMENDMENT TO LIBEL—GENERAL REPAIRS TO SALVING VESSEL—EVIDENCE.

In addition to salvage, the libellant claimed a large sum for general damage to the Lake Winnipeg. After the return of this vessel to Liverpool from New York, she was put upon a dock; and it was alleged that various injuries were then discovered, which were claimed to have been the result of her service to the Alaska. The original libel was thereupon amended on the trial to take in this claim. *Held*, that such injuries, if proved, might be recovered; but that the evidence was insufficient to charge the Alaska specifically with the general repairs referred to. But in fixing a gross award full consideration was given to the Lake Winnipeg's liability to general injury in such a service, and an allowance made sufficient to cover all such damage as might naturally and reasonably be deemed incident to her peculiar service.

3. SAME—LIABILITY OF VESSEL FOR SALVAGE DUE BY CARGO.

A ship is not liable for the proportion of salvage due from her cargo.

4. SAME—COSTS.

Respondents claimed that costs should not be allowed (1) because there was no demand before suit; and (2) because excessive bonds for 20 per cent. of the

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

value of the cargo were taken. *Held*, that the circumstances of this case were so peculiar, and a claim of salvage necessarily so indefinite, that a previous demand was immaterial. It was necessary for the libelant to file its libel at once to enforce its claim against the cargo before it was delivered. Also, though stipulations were taken on account of the cargo to the amount of 20 per cent., there was no evidence of any objection to giving such stipulations, and they were taken upon the simple written obligation of the insurers, without sureties. Costs were allowed, with the exception of the depositions taken in Liverpool as to the alleged general damages.

In Admiralty.

Foster & Thompson, for libelants.

Wilcox, Adams & Macklin, for the Alaska.

Scudder & Carter and Geo. A. Black, for Atlantic Mutual Insurance Company.

BROWN, J. The libel in this case was filed to recover compensation for salvage services, rendered by the libelant's steamer Lake Winnipeg to the steam-ship Alaska, in assisting her to New York, from the fifth to the eighth of February, 1885. The Alaska is an iron passenger steam-ship, of the first class, having but four equals afloat. She is of about 6,930 gross tons, 525 feet long, by 50 feet deep. Her power is 1,800 nominal, working up to 11,300 horsepower, and her ordinary full speed is from $17\frac{1}{2}$ to 18 knots per hour. She left Liverpool for New York on January 24th, with a cargo of fine goods, and 291 passengers. After three or four days of fair weather, during which she made her usual course, she encountered one of the severest of the Atlantic storms, lasting from Tuesday, the 27th, until Saturday, the 31st, when the weather became moderate, and so continued, with the exception of an ordinary gale on Monday, until Tuesday, February 3d. About 8 o'clock in the morning of that day, her rudder was found to be broken and unserviceable. Immediate efforts were made to repair and use the broken rudder, and when this was found to be impracticable, the use of heavy stream cables running aft of the ship were tried as a substitute for a rudder; but it was found insufficient for a ship of her great size. All of Tuesday and Wednesday were employed in these efforts, the ship meantime lying to and drifting some 50 miles to the eastward. Three black balls were exhibited by day, and three red lights by night; and rockets were also sent up to attract attention, and call in the aid of vessels that might come within sight. About 8 o'clock in the evening of Wednesday, the Lake Winnipeg, bound from Liverpool to New York, observing these signals nearly abeam, and about 12 or 13 miles distant to the northward, bore down towards the Alaska, and came to at a little distance on her starboard side. Capt. Murray of the Alaska thereupon went in a small boat to the Lake Winnipeg, and arranged, in an interview with Capt. Gould of the latter, that the Lake Winnipeg should assist him in proceeding to New York by allowing the use of the Lake Winnipeg as a rudder, to be fastened astern of the Alaska by means of two chain cables extending from

each side of the stern of the Alaska to the windlass of the Lake Winnipeg. The vessels at this time were about 600 miles from New York, and about 190 from Halifax.

On account of the great size of the Alaska, Capt. Gould was at first unwilling to undertake to proceed with the Alaska to New York, but wished to go to Halifax instead; but upon the urgent request of Capt. Murray, after conference with his officers, he agreed to go with her to New York. It was agreed to use the cables of the Lake Winnipeg; and thereupon, about 10 o'clock, Capt. Murray returned to the Alaska. After getting in his own cables, which were still out, he exhibited a blue light, the signal agreed upon, whereupon the Lake Winnipeg came up astern within 50 or 75 fathoms' distance. A small boat was then manned and sent out from the Alaska, with ropes, to the Lake Winnipeg, where the ropes were bent upon the cables, which by that means were hauled to the Alaska by her crew, and made fast to the stern bullards of the Alaska, one upon each side. The length of the cables between the two vessels was about 90 fathoms. On the Lake Winnipeg, they passed through the hawse-pipe on each side, through a "compressor," and thence to the windlass where they were attached. A compressor is a somewhat recent device, placed a little forward of the windlass in the direction of each hawse-pipe, designed to keep the hawser in place, and to steady and relieve in some measure the strain on the windlass.

The officers and crew of the Alaska were occupied until about 4 o'clock on the morning of Thursday, the 5th, in getting the cables aboard and in readiness. The ordinary full speed of the Alaska being from 17 to 18 knots, and that of the Lake Winnipeg from 10 to 12 knots, it was arranged that the speed of the Alaska should be reduced for the rest of the voyage. The arrangement with the engineer's department was such that full speed should consist of 46 revolutions only per minute, instead of 61; half speed, 36 revolutions, instead of 45; and slow, 26 revolutions, instead of 32. To prevent any undue strain upon the cables before the action of the two vessels was fully proved, the Alaska started up moderately, and proceeded for a time under the reduced half speed only; and the speed of the Lake Winnipeg was regulated so as to approach as nearly as possible the speed of the Alaska, keeping the cables moderately taut. All orders for steering were given from the Alaska by signals. If the Alaska wished to veer to starboard, the head of the Lake Winnipeg was put to port so that she would go off the port quarter of the Alaska, and thereby, drawing the Alaska's stern to port, direct her head to starboard, as desired. And, *vice versa*, if the Alaska wished to go to port, the Lake Winnipeg was steered to starboard. The direct course for New York was about W. $\frac{1}{2}$ N.

By the above arrangement the vessels proceeded without difficulty in the desired course, and the Alaska was soon put at her reduced full speed. During the 19 hours following, up to 11 o'clock of Thurs-

day night, they made about 211 miles, when the wind having again increased to a moderate gale from the northward, it was deemed prudent, to prevent the possible parting of the cables, to go "dead slow;" *i. e.*, just enough to keep headway on, or about two to three knots per hour. This was maintained until about 4 o'clock in the morning of Friday, the 6th, when the wind and sea having moderated, the Alaska proceeded at her reduced full speed as before. During the following 13 hours, up to about 5 o'clock P. M. of that day, they made about 138 miles, when the weather again becoming boisterous, with thick snow, making it difficult to see signals, the speed of the vessels was reduced to "dead slow" as before, namely, two or three knots only. In the mean time it had been arranged by signals that a green light exhibited by the Lake Winnipeg should direct the Alaska to go ahead at full speed; a blue light, that she should stop.

The testimony showed that the effect of a high wind upon a propeller not kept to her course is to send her bows off some 10 or 12 points from the wind, on account of the greater free-board forward. The wind at this time being to the northward, the Alaska, while going "dead slow" only, gradually fell off to about a south-westerly direction. Between 11 and 12 P. M. the wind moderated, so that it was possible to proceed. According to the testimony of the Alaska's witnesses, the Lake Winnipeg, by some maneuver to the star-board, swung the stern of the Alaska still further to the southward, so that her head went round as far as S. S. E., bringing the wind on her port side. The Winnipeg afterwards went upon her port quarter to slue the Alaska's stern to the eastward, and in a measure did so. At 11:53 the Alaska was put at half speed, and shortly afterwards, as it would seem from the engineer's log, a signal light was exhibited from the Lake Winnipeg, which numerous witnesses from the Alaska testify was a green light; several witnesses from the Lake Winnipeg testify with equal positiveness that it was a blue light. The Alaska, understanding this light as a signal to go ahead full speed, gave this order to her engineer at 12:10; and she was accordingly gradually brought to her full speed of 46 revolutions. Shortly afterwards both cables parted, and the Alaska's engines were immediately stopped at 12:17. One cable was found snapped at the stern of the Alaska, and the other at the bow of the Lake Winnipeg. The cable hanging from the Alaska was hauled in and recovered by her. The Lake Winnipeg was unable to haul in the cable hanging from her bow; and after several hours' attempt to do so, slipped it, and it was lost. By the parting of this cable, and the rebound of the short piece on the Lake Winnipeg, one of her compressors was damaged, and the steam-gear of the windlass also so much damaged that it could not be used. On Saturday morning, at about day-break, the Alaska, after hauling in the cable, and the wind being favorable, proceeded towards New York without the Lake Winnipeg in tow as a rudder, but signaled the latter not to abandon her, to which the latter by signals agreed.

The evidence shows that a propeller, when under suitable headway, naturally runs up head to the wind; and in like manner, under reversed engines, will go up stern to the wind's eye. When the wind is anywhere forward of abeam, sails may be made use of, and so trimmed that, in combination with some changes in speed, a steamer can be kept within one or two points of her desired course, making, not a straight course, but a somewhat zigzag path towards her destination. When the wind is aft of abeam, if she has no temporary rudder, she must lay to; and if upon a lee shore, she could crawl off by reversing and going into the wind's eye. During Saturday, the wind being favorable, the Alaska proceeded on alone, using her sails as above stated, from about 4 A. M. until about 10 P. M., making 149 miles. The Lake Winnipeg at about the same time that the cables broke, had one of her feed-pumps broken, occasioned, as it is said, through the "racing" of the engine, upon going astern, resulting in the loss of two knots' speed. She pursued the Alaska during Saturday as fast as she was able, being sometimes nearly hull down. About 10 o'clock, the wind having died away, and the Alaska being, therefore, unable to steer her course, the remaining cable was again sent aboard the Lake Winnipeg, as soon as she had come up, and made fast as before. They were then about 175 miles from Sandy Hook. They got under way at about one and a half o'clock on Sunday morning, and arrived inside of Sandy Hook at about 4 P. M., having taken a pilot aboard off Fire island at about noon. The Lake Winnipeg then left her, and proceeded up the bay; and the Alaska was subsequently taken by 10 tugs to her wharf.

The Lake Winnipeg is an iron-screw propeller, about 325 feet long and 3,300 tons gross tonnage, belonging to what is known as the "Beaver Line," running from Liverpool to Montreal in summer, and to New York in winter. Her value at this time was about \$250,000, and her cargo about \$95,000. Besides her master, she had 3 officers, a chief engineer and 4 assistants, and 46 other men, forming the ship's company. Upon this trip she had 3 saloon passengers, and 21 steerage passengers. She left Liverpool on the afternoon of January 22d, passed through the hurricane in the succeeding week with difficulty, but without apparent serious injury; and, but for the detention in assisting the Alaska, would have reached Sandy Hook on the morning of February 7th, instead of the afternoon of February 8th.

The libel was filed on the eleventh of February, the day after the Alaska reached her dock. The vessel being in custody and not bonded, the taking of testimony was immediately commenced, and a large mass of evidence has been taken. On the thirtieth of March, upon affidavits showing that the Lake Winnipeg, after her return trip to Liverpool, on being put upon the graving dock, had been found to have sustained considerable damage, said to be attributable to her service to the Alaska, depositions were ordered to be taken before the American vice-consul there on that subject, and the log of the Lake

Winnipeg upon her return trip to be produced. The evidence thus taken was received during the hearing of the cause, and an amendment to the libel allowed, alleging damages received from rendering the services to the amount of some £7,500.

The principal contention in the case has been as regards the basis upon which compensation for the Winnipeg's services should be awarded. The libel alleges the case to be a very meritorious salvage service; that the Alaska when reached by the Lake Winnipeg "was virtually at the mercy of the winds and waves; that in the course of the efforts to rescue her, and during the gale of Thursday night, the vessels became unmanageable and were stopped; that the Lake Winnipeg was in constant danger of collision; that it was necessary to watch every motion of the Alaska, and to work the helm and engines of the Lake Winnipeg accordingly; that the following night, during the gale with snow, the most unremitting diligence was required from the Lake Winnipeg to prevent a collision between the two vessels, which would have resulted in the foundering and total loss of both; that but for the libellant's services the Alaska would have been exposed to great risk of total loss, and would probably have been totally lost; and that the value of the Alaska and her cargo was upwards of \$1,250,000."

The answer avers in substance that the Alaska, though without a rudder, was in no danger; that in requesting the Lake Winnipeg to serve as a rudder, "the sole purpose of such request was to accelerate the passage to New York;" that though the progress of the Alaska was retarded through the want of a rudder, yet that "no danger was apprehended by either her officers, passengers, or crew, nor did any danger at any time exist;" that neither of the vessels was at any time unmanageable, and avers that "no collision, with proper precaution, could have happened then, or at any time, and that after the Lake Winnipeg was attached, the Alaska's engines kept working slowly ahead, so as to prevent any possibility of accident."

The Alaska, it is urged, was at no time in any danger, or even any reasonable apprehension of danger, notwithstanding the loss of her rudder, because, among the numerous devices that may be resorted to for steering purposes, some would certainly have been found to answer the purpose, although the means tried on the first two days had proved unsatisfactory, those means having been first tried, because, if successful, they would have permitted the Alaska to proceed under full speed; and, *second*, because even without a rudder, the vessel was not unnavigable, but could have made her desired course whenever the wind was forward of abeam; and whenever not favorable to her progress, she could, by backing, at all times have kept out of danger, and thus in time have reached port. The evidence showed one or two instances of steamers navigated in this manner. Capt. Price, on a passage from Melbourne to England, in an iron steamer of 3,000 tons burden, lost his rudder while running south of New

Zealand, and brought his ship 14,000 miles safely around Cape Horn to England, with the use of a temporary rudder, consisting of two pieces of timber lashed together. Capt. Sumner, in April, 1871, master of the steamer *Virginia*, of the National line, 3,500 tons, lost his rudder in a gale, about 1,100 miles from New York, and arrived at Sandy Hook on the 18th without assistance, using a hawser and a spar tow, but "found the head sails set back of more service than either, on the average." Capt. Kemble, in command of the wooden steam-propeller *Knickerbocker*, of the Cromwell line, 1,150 net tons, in a voyage from New Orleans to New York, in April, 1884, lost his rudder at 3 o'clock in the afternoon of Sunday about 150 miles S. S. W. of Hatteras. His course was N. E. and under favorable winds from that direction he came within 100 miles of Sandy Hook by the use of his propeller with sails, in the manner above described, without any rudder, and without loss of time. The weather then becoming mild, he got in place a temporary rudder made from spars and spar lumber, with which he reached New York some 16 or 17 hours only behind time.

These instances are sufficient to illustrate, what is doubtless true, that a steamer, in other respects staunch and well equipped, though of the size of the *Alaska*, is not in a desperate situation from the loss of her rudder merely, and in abundant sea-room is not in immediate danger. In the numerous cases of salvage reported, very few are found arising upon a loss of the rudder only. It is, perhaps, a fair inference from this circumstance that, in most cases where a rudder has been lost, some of the many devices which are available for steerage purposes have been successfully employed, so as to avoid calling in salvage assistance. One case of this character, that of *The Dido*, 2 Paine, 243, arose in this district some 50 years ago, in which, upon appeal to the circuit court, a decree of BETTS, J., in the district court, amounting to \$5,000, was reversed by Mr. Justice THOMPSON, who intimates the opinion that the brig, being complete in all other respects, and not being unnavigable through the mere loss of her rudder, was not liable for salvage service on being towed in. "If the vessel was navigable so as to be able to avoid any threatened danger, although navigated with greater difficulty and delay, it ought not to be considered a case for salvage." The case, however, was not finally decided upon this ground. The brig had been taken in charge by the libelants, who were pilots, at a point about 25 or 30 miles from Sandy Hook, and about 10 miles distant from shore, and they had towed the vessel into the harbor. They afterwards, by mutual agreement, submitted the question of their compensation to the board of wardens, in accordance with the agreement between the captain and the pilots when they took charge of the ship. The wardens had allowed \$162.50. The libelants, dissatisfied, brought a suit for salvage in the district court, where a salvage award was allowed. Upon appeal, the award of the board of wardens only was allowed,

on the ground that when the service was entered upon, neither party understood or intended it to be a salvage service. In the case of pilots it is well settled that salvage compensation will not be allowed them except in extraordinary cases of difficulty, where their services are clearly outside the sphere of their official duties. *Hobart v. Drogan*, 10 Pet. 108; *The Æolus*, L. R. 4 Adm. & Ecc. 29; *The John Andries*, Swab. 226, 303. It was upon this principle, and on the understanding of the parties themselves, that the judgment in the case of *The Dido* was finally rested.

A later case, very conspicuous at the time, of a salvage award growing out of the loss of a rudder, is the case of *Towle v. The S. S. Great Eastern*, which also arose in this district, and was heard before SHIPMAN, J., whose opinion is reported in full in the *New York Transcript* of November 13, 1864. The *Great Eastern* left Liverpool, September 10, 1861, for a voyage to New York, with about 400 passengers and an equal number of officers and crew. When two days out, and about 280 miles west of Cape Clear, in a heavy storm, her paddle wheels were carried away. But she also had a screw propeller uninjured, by which she could make very good headway. On the night of the 12th she rolled with such violence in the trough of the sea as to carry from side to side of the ship all the movable objects on her deck and in her cabins. Much of her furniture was destroyed, several of her crew and passengers injured, and a great part of her luggage drenched and crushed into a mass of worthless rubbish. During that night her rudder-shaft had been twisted off below all the points of connection with the steering-gear, and the ship lay helpless in the trough of the sea, rolling heavily with every swell. Her sails were blown away in a subsequent attempt to control her movements by them, and no means were left by which her head could be brought up, and her position on the sea changed. She was as unmanageable as if her rudder had been entirely gone. The only way of getting any control of the motions of the ship was to secure some kind of efficient steering-gear by attaching it to the rudder-shaft below the point of fracture, and connecting it with the wheel. During Friday and Saturday the weather had moderated. During these two days Capt. Walker and the chief engineer had tried various devices for making use of what remained of the rudder, as well as independent expedients for steering the vessel; but all without success. The libelant was a civil and mechanical engineer, who was a passenger on the ship. He had been watching the efforts for her relief, and had formed a plan of his own. This plan was at first rejected by the captain, but about 5 o'clock on Saturday afternoon, having apparently lost confidence in his own expedients, he authorized the libelant to try his plan, and placed a sufficient number of men at his disposal. His work was completed at 5 p. m. the following day, and was found to be entirely successful. The plan adopted was the use of chains in connection with the shaft and the rudder in its disabled condition. During the same time some inde-

pendent means were also employed by the captain and officers in other ways towards the same end. But the court found that the efficient means were those adopted and carried out by the passenger.

Upon the libel for salvage services not much question seems to have been made that the service itself fell within the description of salvage services. The court, in reference to this point, say: "That the peril of the ship was great, and her position critical, in the judgment of her commander, is evident from the fact that he intrusted to this stranger a work, upon the result of which her salvation depended, and which for two days had utterly baffled him and his engineers." The chief point in litigation was whether the libelant, being a passenger, was entitled to claim a salvage reward. The authorities on this subject are fully reviewed by the court, and the conclusion arrived at that, though passengers are required to do ordinary work, such as pumping, in aid of a ship in distress, without any claim for compensation, yet they may justly claim salvage for services of an extraordinary character beyond the line of their duty, such as mere ordinary service in pumping, or working the ship by the usual and well-known means; and \$15,000 were, therefore, awarded to the libelant. See *The Connemara*, 108 U. S. 352, 358; S. C. 2 Sup. Ct. Rep. 754. As the newspaper report of this case is not easily accessible, I have quoted from it more largely, considering its interesting and novel features, than I should otherwise have done.

From the widely dissimilar cases of *The Dido* and *Great Eastern*, it is apparent, what is indeed otherwise sufficiently obvious, that the mere loss of the rudder is not in itself a conclusive circumstance as to the danger in which a ship should be regarded, and that its importance depends on the other circumstances of the case. Chief among these are the size of the vessel herself; for, upon this mainly depend the readiness, the effectiveness, or the difficulty with which temporary substitutes may be supplied. Next are the other means of control at command, the season, the weather, and the situation of the ship. With small vessels, there is usually no difficulty in supplying speedily some efficient substitute for a lost rudder. In a vessel of the size of the *Great Eastern*, whose tonnage is not stated in the opinion above referred to, but which in another case—*The Great Eastern*, 3 Moore, P. C. (N. S.) 31—is stated to have been 13,344 tons burden, it may be very difficult or impossible to supply an effective temporary rudder in time to avert disaster. Upon the more modern views of the nature of salvage services, I think a vessel of any considerable size that had lost her rudder would be deemed a proper subject of salvage. In the case of *The Anders Knape*, a steam-ship of but 401 tons, (4 Prob. Div. 213,) Sir ROBERT PHILLIMORE says: "This vessel had been on the sand and had sustained some damage to her rudder. She was, therefore, in a condition in which salvage service might be rendered to her."

The *Alaska*, though of considerably less tonnage than the *Great Eastern*, yet, in comparison with vessels of ordinary size, somewhat

approached her in magnitude, being somewhat above half the latter's tonnage. That there was no small difficulty in providing suitable steering appliances after the loss of her rudder is sufficiently evident, not merely from the great size of the ship, but also from the loss of two days' valuable time in the unsuccessful effort to provide them. There were doubtless various other expedients that might have been tried; and I have little doubt that sooner or later, had no assistance been availed of, her master would have found some means of steering her. But in the mean time she was clearly in an unseaworthy condition. She would be exposed, therefore, to more than ordinary hazards in the severe gales incident to the most boisterous season of the year. The evidence shows, it is true, that with favorable winds forward of abeam, a propeller may pursue her course through the use of her sails and her propeller so as to make a zigzag course towards her destination. That this cannot, however, be safely relied on in a severe gale by a very large steamer is rendered pretty certain from the experience of the Great Eastern, whose sails in a similar attempt were blown away. Nor could she trust to herself at all in a calm, or under the influence of gales near a land-locked coast, or in the vicinity of reefs or shoals, or when subjected to tides and currents near land, since, under these circumstances, she would have no means whatever of avoiding them; nor had she any available means of avoiding collisions with other vessels.

Upon the question whether the Alaska was in a fit condition to pursue her voyage towards New York, at that season, without any temporary rudder, I must find that the conduct and judgment of Capt. Murray, under the circumstances, furnish the most conclusive evidence. He was within 600 miles of New York; only about 32 or 33 hours' distance with the Alaska's usual speed, and scarcely more than 48 hours' distance under half speed of her engines. On Tuesday morning, when the loss of the rudder was discovered, the wind was W. N. W., and, according to her log, continued from that to W. by N. during nearly all of Tuesday and Wednesday. The wind, therefore, was from a favorable quarter. The captain was most anxious to reach port speedily. Had it been deemed safe or prudent to proceed towards the coast without a rudder, by a zigzag path, through the use of the sails and the propeller, it cannot be doubted that he would have done so. That he did not proceed, but spent two days, in the mean time drifting E. S. E. some 53 miles, in the attempt to supply a temporary rudder, I must hold to be conclusive proof that it was not safe or expedient to do so with a vessel like the Alaska at that season. Her situation, therefore, was that of a great and valuable ship disabled in an essential part, and unable, in the judgment of her most competent commander, to proceed with safety towards her port of destination until the want of a rudder was in some way supplied; while the means and the time necessary to supply this want were, to some extent at least, uncertain. That such a vessel, in such

a situation, was a proper subject of salvage assistance I cannot doubt; nor that the service rendered was one of no inconsiderable merit. In the case of *The Reward*, 1 W. Rob. 177, Dr. LUSHINGTON, in distinguishing a towage service from a salvage service, says:

"Mere towage service is confined to vessels that have received no injury or damage, and mere towage reward is payable in those cases only where the vessel receiving the services is in the same condition she would ordinarily be in without having encountered any damage or accident."

It was upon this distinction that in the case of *The Emily B. Souder*, 15 Blatchf. 185, only a towage reward was allowed; because the steam-ship, when taken in tow from 50 to 100 miles distant from New York, was in the same condition as to her motive power as when she left St. Thomas, being under no additional disability, and desiring only to expedite her progress.

It is urged that in the present case Capt. Murray, when the services of the Lake Winnipeg were secured, desired only to expedite his progress to New York; and in one sense this is doubtless true. But the ship was not in the same condition in which she had hitherto been; and she had been for two days drifting to the eastward because she could not proceed with safety. Exhibiting signals, flash-lights, and rockets, to attract the attention and aid of vessels within sight, are further strong evidences of the Alaska's need of assistance. Such signals are always held significant of the intention of the parties. *The Jubilee*, 42 Law T. (N. S.) 594. To disregard such signals is a gross breach of maritime obligation; to exhibit them when there is no need of assistance would be a wanton breach of good faith upon the sea. The signals in this case were given, as the sequel shows, not to attract attention merely, but to obtain help. To tow or to steer another vessel that is under no necessity whatever of such a service, but desires it only for her mere convenience in reaching port a little earlier, is wholly outside of the business of such vessels as the Lake Winnipeg at sea. Such service in departing from the proper business of her voyage is not expected to be asked or given, except under some reasonable apprehensions of difficulty or danger; and that is a sufficient basis for a salvage award. In the case of *The Alphonso*, 1 Curt. 376, 378, CURTIS, J., says:

"The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a case of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the damage and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature."

In the case of *The Charlotte*, 3 W. Rob. 68, 71, it is said:

"It is not necessary that the distress should be actual or immediate, or the danger imminent and absolute. It is sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the service were not rendered."

This expression of the law has been since repeatedly affirmed and followed. *The Strathnaver*, L. R. 1 App. Cas. 58, 65; *The Saragossa*, 1 Ben. 551, 553. So, in the case of *The Raikes*, 1 Hag. 247, it was held to be sufficient that the vessel is "in a situation of actual apprehension, though not of actual danger." *The Phantom*, L. R. 1 Adm. & Ecc. 58; *The Joseph C. Griggs*, 1 Ben. 81. And "the degree of danger," says Dr. LUSHINGTON, "is immaterial in considering the nature of the service." *The Westminster*, 1 W. Rob. 232. In the recent case of *McConnachie v. Kerr*, 9 FED. REP. 50, where the services were denied to be of a salvage character, this court, upon a careful consideration of the subject, defined a salvage service as "a service that is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger, either present or to be reasonably apprehended;" and a towage service as "one which is rendered for the mere purpose of expediting the voyage, without reference to any circumstances of danger." Affirmed on appeal. 15 FED. REP. 545. The same views are clearly expressed by BLATCHFORD, J., in the case of *The Leipsic*, 10 FED. REP. 585, 589.

In endeavoring to fix a suitable salvage reward for the services rendered, all the circumstances of both vessels have to be considered.

1. The Alaska was not at the time in any immediate peril; although, as the log shows, the sea was high, and she was lurching heavily. She was staunch in every respect, and there appears to have been no apprehension on the part of her officers, crew, or passengers of any immediate danger. During the two days, while the different devices for steering were tried, the ordinary life of the passengers, with their games and pastimes, went on as usual. There is no evidence of any lack of confidence in the master's ability, sooner or later, as I have said, to reach New York or some other port without assistance, either by some successful expedient for steering, or by proceeding on in favorable weather without it. The small stock of surplus coal, however, leaves a steamer like the Alaska no great latitude for experiments, or for proceeding long much otherwise than directly upon her course. But it has been held in many cases that the ability of steamers to reach some port by sail does not prevent a towage service from receiving a suitable salvage reward; although the ability of the ship in this respect bears directly upon the amount awarded. See cases of *The Saragossa*, *The Colon*, and other cases *infra*, 613 *et seq.*

The loss of the rudder to a vessel like the Alaska was certainly a serious loss. This loss might, perhaps, have been supplied; but until it was supplied she was unable to proceed with safety, unless attended by a companion to assist her in case of need. In the mean time, through her temporary disability in the most boisterous season of the year, she was subject to liabilities of additional disaster or accident greatly beyond the perils incident to her ordinary condition. Until effective steering appliances were obtained, although she was

not in immediate danger, there was, in my judgment, reasonable apprehension of danger, and that in no small degree. Moreover, the business interests of the ship, and of the line of which she was a part, as well as the comfort of her passengers, demanded that she should reach port as speedily as possible, without exposure to the delays and the perils of a reliance upon her own unaided and uncertain efforts. It was in this situation that the assistance of the Lake Winnipeg was urgently sought. With her, as an escort merely, ready to give aid when needed, the Alaska might, perhaps, with favorable winds, have safely gone on, steered by her sails, as she was steered all day Saturday. Had she, with such winds and such an escort, reached port safely, without any need of attaching the Lake Winnipeg as a rudder, the Lake Winnipeg would still have been entitled to some salvage award for thus attending and standing by; because her presence would have enabled the Alaska to do what she could not otherwise safely have ventured to do, viz., take the chance of the winds and weather in approaching the coast from her position at that season. Instead of adopting this course, the Lake Winnipeg was attached at once on tow of the Alaska, and put to service as a rudder. A sailing vessel, it is said, might have been used for the same purpose. If so, a sailing vessel would evidently have been less convenient, and less expeditious; and the experience of the Chateau Margaux, about a year ago, as reported, would indicate that a sailing vessel could not certainly have been relied on for such a purpose.

2. The services of the Lake Winnipeg, as a rudder made fast to the Alaska by two cables, were by no means free from danger. The situation of vessels in tow, one of another, upon the ocean, in tempestuous weather, is always attended with danger. Constant vigilance is necessary to avert it. The evidence shows unremitting care, and the necessity of frequent maneuvering of the Lake Winnipeg in this service. In the case of *The Daniel Steinman*, 19 FED. REP. 918, 921, BENEDICT, J., observes: "In such a service, care and watchfulness will not always prevent disaster;" and Sir ROBERT PHILLIMORE, in deciding the case of *The City of Chester*, 26 Mitch. Mar. Reg. 111, says: "It is well known to the elder brethren that in all these cases of large steam-ships rendering services to each other there is very great danger, and they will require skillful navigation to avoid it." An instance of damage by collision during a salvage service, and of a counter-claim in consequence, is found in the case of *The Baltic*, L. R. 4 Adm. & Ecc. 178.

In this case the sea had been high, and there was still a heavy swell when the service of the Lake Winnipeg commenced. On Thursday night, and again on Friday night, there was a sufficient gale with head winds to make it prudent, if not actually necessary, for the ships to lie to. The Lake Winnipeg stopped her engines, and the Alaska proceeded at the rate of but two or three knots; only sufficient to keep the cables taut. Part of the time on Friday night there was

snow, so that the signals could be discerned with difficulty. The evidence on the part of the Lake Winnipeg shows constant attention to the engines, and the frequent changes that were necessary in her management. Her commander had little rest during the entire service, and the regular watches were much broken up. On Friday night, shortly after the vessels had resumed their course, the cables parted. The evidence leaves some doubt as to the circumstances that led to this accident. But there is no doubt that there was a misunderstanding between the two vessels as to the signal intended to be given. A green light was seen by the Alaska, when a blue one was intended to be exhibited by the Lake Winnipeg. Had there been a misunderstanding in the opposite direction, a much worse disaster than the breaking of the cables might have happened. If no error or mistake were made, there was not, indeed, great danger. But the Lake Winnipeg, in undertaking this service, was subject to the great dangers that might easily and naturally happen through mistakes or errors notwithstanding the best intended efforts.

3. The Lake Winnipeg with her cargo was of the value of \$325,000 to \$350,000. While rendering this service to the Alaska she sustained some undoubted injuries and losses, viz.: the loss of her chain cable, damage to her windlass and hawse-pipe forward, and to one feed-pump in the engine department. These losses and injuries were not serious or of any very great value. Compensation for such losses and injuries as immediately and plainly grow out of the salvage service is always made in some form, either by a specific allowance in addition to the salvage award, or by taking it into consideration in fixing a gross sum. Besides these certain items of loss, a large claim has been presented, not in the original libel, for alleged additional injuries of a more general character, through general strain of the Lake Winnipeg, as shown by the starting of some of the plates and waterways amid-ships, and various other general injuries, and need of general repairs about her stern and rudder, and in the engine-room and machinery. These general repairs were only found necessary upon a survey of the Lake Winnipeg at Liverpool after her homeward trip next subsequent to her arrival with the Alaska at New York. They are alleged to have been the result of her services to the Alaska, and they have caused me considerable embarrassment.

It is not until recently that any such consequential injuries of a general nature have been made the subject of a claim for specific compensation. The difficulty of proving such specific injuries of a general character, and of distinguishing them from the perils of the sea proper, is very great. In the recent case (1884) of *The City of Chester*, L. R. 9 Prob. Div. 182, specific evidence of such general injury was rejected altogether in the court below; but in the gross award to the ship allowance was made for such liability to injury. On appeal, the evidence was held competent; but the libellant was put to his election to accept the gross award of £4,500 to the ship, as made

by the court below, or else to take £1,000 only as salvage reward, together with such further particular damage, as he could prove arose from the salvage services. *Bird v. Gibb, (The De Bay,)* L. R. 8 App. Cas. 559. While the subsequent need of these general repairs to the Lake Winnipeg is not doubted, the evidence that it arose through the aid rendered to the Alaska rests wholly upon the testimony of surveyors, inspectors, and the experts who examined her on the graving dock at Liverpool, and who gave their testimony there. Several of these witnesses on the part of the libelants, on their direct examination, testify that in their judgment these injuries, taken as a whole, are not such as would naturally be expected through heavy weather alone, but are to be ascribed to the unnatural strain, twisting, or torsion to which the Lake Winnipeg was exposed while her head was held, as it were, in a vice, by the cables attached to the Alaska, in the high seas, and unable to accommodate herself to the waves by her natural freedom of motion. Still, the judgment of these witnesses appears to be rather a theoretical judgment than to rest upon any proved facts. The careful cross-examination of these witnesses sufficiently discloses the uncertainty that attends their evidence and their opinions on this subject. The examination and survey made by them at Liverpool seem also to have been made for the purpose of procuring evidence of this character to be used against the Alaska; and yet no notice of this survey was given to her owner or agent there, nor had he any knowledge of it, or opportunity to make examination. One of the inspectors thus employed by the libelants for the purpose disagreed with the others, and his testimony contrary to the rest was given on behalf of the respondents. Moreover, the log of the Lake Winnipeg shows that upon her return voyage she experienced weather of extraordinary severity; it abounds with expressions showing this almost from the beginning to the end of the voyage; it refers to masses of water taken aboard, and to injuries to the windlass and her chain covers forward, and to other severe injuries on deck, such as only extraordinary weather could produce. These circumstances were not made known to the witnesses and to the cross-examining counsel. The Lake Winnipeg, moreover, was not in any essentially different situation while steering the Alaska from that of disabled steam-ships in tow of other salving steamers, except that she had much more control of her own motions.

Cases of the latter kind are very numerous, many of them showing towage during weather much worse than that experienced during the four days the Lake Winnipeg was rendering her services to the Alaska. No evidence was given, drawn from these familiar instances, to support the hypothesis of the libelants' experts; nor did they substantiate their views by any proof of knowledge of similar general injury undoubtedly arising from the use of cables in towing. Again, had these injuries arisen from the service to the Alaska, they should have been apparent on the arrival of the Lake Winnipeg at

New York, and would naturally have caused an examination and repair by the libelants here. Nothing of that kind took place. On the other hand, one of the most competent experts, in the discharge of his duties to the insurance companies here, made what he deemed a sufficient preliminary examination upon the arrival of the Lake Winnipeg in New York, to determine whether or not it was necessary for her to go to the dry-dock for a more thorough survey, and for repairs. He found her in good condition, and saw no evidence of any such need of general repair as is now alleged. Other experts, as well as the one alluded to in Liverpool, testified upon the trial that the repairs to the Lake Winnipeg afterwards found necessary are only such as could be fully accounted for by the remarkable weather and strain of the ship, as described in the log on her subsequent voyage. For these reasons I must regard the evidence taken at Liverpool as insufficient to charge the Alaska specifically with the general repairs referred to. But in fixing a gross award, and in the share apportioned to the ship, full consideration will be given to her liability to such general injury, and an allowance made sufficient to cover all such damage as might naturally and reasonably be deemed incident to her peculiar service in the weather and other circumstances proved. In the case of *The City of Chester*, where the towing vessel, the Missouri, was subjected to greater strains, because the City of Chester, the vessel towed, was a much heavier vessel than the Lake Winnipeg, £4,500 were allowed by the court below.

Independently of the injuries and repairs just referred to, considering the disabled condition of the Alaska, her inability at that time to proceed safely towards her port of destination, her signals for assistance, the uncertainty as to her ability to extemporize an effective rudder, and thus reach port without at least very considerable delay, and the reasonable apprehension as regards what might happen to her in the mean time, if unaided, in the most tempestuous season of the year, and her consequent safety or security; considering also the great value of the ship and cargo, and the number of passengers on board, and the value of the Lake Winnipeg, which was employed in the service, and her cargo, and the additional danger to which they were exposed; and the promptitude, fidelity, and complete success with which the service was rendered,—there is clearly sufficient in the case to entitle the Lake Winnipeg, her officers and crew, to a substantial salvage reward.

It was practically immaterial to the Lake Winnipeg whether she was serving as a rudder in tow of the Alaska, or whether she was towing some smaller vessel astern of herself. In the absence of precise precedents to serve as a guide in fixing the amount of salvage, under the circumstances above stated, the cases of salvage services rendered to steamers whose engines, machinery, or propeller shaft were disabled, and in which the steamers, by the use of their sails and rudder, were still in a condition to make some progress on their voyage,

or to reach some port, seem to me to furnish the best analogy, and, on the whole, a tolerably fair one.

The principles which should guide the court in fixing salvage compensation have been recently stated by Mr. Justice BRADLEY in the case of *The Suliste*, 5 FED. REP. 102, as follows:

"Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy; while salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it would not secure its objects. The courts should be liberal, but not extravagant; otherwise that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril."

It is clear that masters of vessels, under some apprehension of danger, but not in immediate peril, ought not to be deterred from accepting proffered aid, or from seeking it when advisable, by the fear of its unreasonable cost. The following are a few of the numerous cases of disabled machinery, in which a salvage award was given for services in towing, though the vessel had the use of her sails and rudder, and might have made some port:

The Saragossa, 1 Ben. 553; value of the ship and cargo about \$100,000; towed by the *Charles W. Lord*; value of ship and cargo, \$434,000; time, 36 hours; award, (9%.) \$9,000.

The Colon, 4 FED. REP. 469; 2,686 tons; value of the ship and cargo, \$480,000; towed by the *Etna*; 1,274 tons; value of ship and cargo, \$200,000; time, four and one-half days; award, (2½%.) \$10,000.

The Leipsic, 10 FED. REP. 585; 2,000 tons; value, \$250,000; towed by the *Grecian*; 1,092 tons; value, \$90,000; award, (2½%.) \$5,500. The services in the case of the *Leipsic* were less urgent than in this.

The City of Berlin, 37 Law T. (N. S.) 307; 5,491 gross tons; value, \$1,100,000; towed by the *Spain*, of 4,512 tons; value, \$750,000; time three and one-fourth days; award in court below, £2,000, increased on appeal to (14.5%.) £4,000. (1877.)

The City of Richmond, 25 Mitch. Mar. Reg. 271; gross tonnage, 4,623; value, \$2,500,000; towed by the *Circassia*; 4,272 tons; value, \$750,000; time, 54 hours; award, (1½%.) £7,000. (1880.) The great value of the ship and cargo salvaged were here specially noted in making this large award.

The Silesia, L. R. 5 Prob. Div. 177; 3,156 tons; value, \$500,000; towed by the *Vaderland*; 2,748 tons; value, \$350,000; time, three days; award, (7%.) £7,000. (1880.) The *Silesia* was in a much more dangerous condition. The *Vaderland* went back, losing six days' time; and the loss of £500 on the charter of another vessel was included.

The Hanover, 28 Mitch. Mar. Reg. 81; 2,572 tons; value, \$350,000; towed by the Persian Monarch; 3,922 tons; value, \$700,000; time, seven days; award, ($5\frac{1}{2}\%$.) £4,000. (1883.)

The Lisbonense, 28 Mitch. Mar. Reg. 1,422; tonnage, 1,681; value, \$220,000; towed by the Pascal; 1,950 tons; value, \$360,000; time, six days; award, ($6\frac{1}{2}\%$.) £3,000. (1883.)

The Horace, 29 Mitch. Mar. Reg. 310; 1,060 tons; value, \$150,000; towed by the Historian; 1,830 tons; value, \$400,000; time, six days; award, ($7\frac{1}{2}\%$.) £2,400. (1884.)

The France, 29 Mitch. Mar. Reg. 310; 4,281 tons; value, \$500,000; towed by the Marengo; 2,270 tons; value, \$300,000; time, four days; award, ($3\frac{1}{2}\%$.) £4,500. (1884.)

The Daniel Steinman, 19 FED. REP. 918; 1,790 tons; value, \$252,000; towed by the Republic; value, \$780,000; time, 36 hours; award, (10%.) \$25,000. (1884.)

In some of the above cases there were much greater urgency and greater apprehension of danger than in the case of *The Alaska*; in others, particularly in those of *The Leipsic* and of *The Colon*, there were less. Upon the diverse evidence as to the value of the Alaska, ranging from \$400,000 to \$750,000, I adopt that of \$550,000, as her value in the condition in which she arrived in port; her freight, which was saved, \$12,042, making \$562,042; her cargo, it was agreed, was worth \$474,533,—making the aggregate value of ship and cargo \$1,041,575. The value of the Lake Winnipeg and her cargo, as above stated, was from \$325,000 to \$350,000. The award, which it seems to me, under the circumstances of this case, will do justice to all parties, will be an allowance of $2\frac{1}{2}\%$ per cent. of the value of the ship and cargo as above found, amounting altogether to \$26,039; of which I allow \$7,000 to the master and crew, and the residue to the owners, of the Lake Winnipeg. The award is made in the form of a percentage for convenience in apportioning the share of the cargo among the great number of cargo owners; and not because a percentage, by itself considered, affords any proper criterion of a salvage award. This apportionment to the steamer, while not covering the full claims for the repairs in Liverpool, which are not satisfactorily proved to have been made necessary by her service to the Alaska alone, is, nevertheless, intended to cover such special damages as were proved, and also to include a fair allowance for such consequential damages as she might naturally be subjected to in rendering this peculiar service in tempestuous weather on the high seas, as was done in the case of *The De Bay*, 8 App. Cas. 559, and of *The City of Chester*, 9 Prob. Div. 182.

If the allowance to the master and crew in this case is less than one-half that allowed to the passenger in the case of *The Great Eastern*, *supra*, it will be noted, on reference to the opinion of SHIPMAN, J., that the Great Eastern was clearly in a situation of present and immediate peril, which was certainly not the case with the Alaska. The award of \$15,000 in that case was properly much less than here, not-

withstanding the greater danger of the Great Eastern, because there it all went to the passenger himself for his ingenuity and services during a single day, rendered, in part, even, for his own safety; and no other property was there employed or put at risk in the salvage service; while in this case property to the amount of a third of a million dollars was employed, and exposed to more or less increased hazard. If, on the other hand, a larger sum than I have given is awarded in a very few of the cases above cited, it must be observed that the Alaska was not in immediate danger; she was not disabled in her motive power; all the towing was done by herself; the Lake Winnipeg could not have towed her, and was not desired to do so. During one-fourth of the time the Alaska proceeded alone, making about 149 miles unattended; and during most of the time the Alaska could have made her own way, needing only an escort for service in case of actual need. The amount awarded seems to me fair and liberal under the peculiar facts of this case.

Of the amount awarded to the master and crew, \$2,000 is apportioned to the master, \$500 each to the first officer and chief engineer, and the remaining \$4,000 to the other officers and crew, in proportion to their wages.

The respondents claim that costs should not be allowed to the libellant—*First*, because there was no demand before suit; and, *second*, because 20 per cent. bonds were required. The circumstances of the case, however, are so peculiar, and a claim of salvage is necessarily so indefinite, and the defense has exhibited such a very different view of the case from that of the libellant, that it is manifest that a previous demand would have been an idle ceremony, and is therefore immaterial. No offer was made by the respondents. The amount of bonds asked from those representing the cargo does not concern the claimants of the ship. The steamer has been undergoing repairs here, and loading for a voyage, which is advertised for Tuesday next. Though not giving any bonds or stipulation for herself, she has not been obstructed or detained by the libellants an hour in the whole course of the suit. Moreover, as the Alaska commenced her discharge on the day of her arrival, and her cargo would be immediately distributed, some of it being in fact delivered on the following day, it was incumbent upon the libellants, if they would secure a salvage award against the cargo, to proceed without delay, since the ship is not liable for the salvage due from the cargo. *The Pyrennee*, Brown & L. 189; *The Col. Adams*, 19 FED. REP. 795.

There was also additional reason for commencing the suit, in order to take immediately the testimony of the witnesses who were about to depart. Though stipulations were taken on account of the cargo, to the amount of 20 per cent., there is no evidence of any controversy or any objection to give stipulations to this amount. The great bulk was covered by insurance; and the stipulation was taken upon the simple written obligation of the insurers, without sureties, and without for-

mal justification. The suit also has, at every step, been prosecuted with great diligence, so as to reach a judgment before the Alaska should need to depart. So far, therefore, is the case from presenting any evidence of harsh or oppressive conduct on the part of the libelants' proctors, that it seems to me eminently the reverse of that, both as respects the ship and the stipulators for the cargo. The libelants' proctors, in consulting the interest and convenience of both ship and cargo, have more than met all the obligations of professional courtesy; and there is no reason, therefore, for withholding the usual allowance of costs. To this I make a partial exception as respects the expense of the depositions taken at Liverpool, for the reason that the survey there was taken without notice to the respondents, and that the facts were not presented to the witnesses and the opposing counsel, in reference to the circumstances of the last trip, which had an essential bearing upon the whole examination. This portion of the costs is therefore disallowed. A decree may be entered in conformity with this opinion.

THE CITY OF NEW YORK.

(District Court, S. D. New York. April 29, 1885.)

1. COMMISSIONERS' REPORT—EVIDENCE AS TO VALUE OF VESSEL—BEST EVIDENCE.

A collision occurred between the steamer City of New York and the iron bark H., which resulted in the total loss of the bark and injury to the steamer. On the trial both vessels were found in fault, the damages were directed to be divided, and the matter referred to a commissioner to take proof of damage. In the testimony as to the value of the bark, it was shown that no sale of an iron vessel had ever taken place in New York, and market value could not be proved here. Libelants offered the testimony of one witness, an insurance inspector, who had seen the bark six years before; but they did not issue a commission to Dundee, where the bark was built, to obtain evidence of her value, either from cost of construction or from known sales of similar vessels. Respondents' witnesses, who were equal as experts to the witness of the libelants, put a lower value on the bark. *Held* that, as libelants had not produced the best evidence in their power, the estimates of respondents' witnesses must be adopted.

2. SAME—EVIDENCE AS TO VALUE OF STORES.

Testimony as to the ship's stores was given chiefly by the mate of the bark, who made a list of them from his recollection. No evidence was given as to the actual purchase of stores. *Held*, that the estimate of the value of a vessel ordinarily includes her usual outfit. As there was nothing in the mate's testimony to indicate how much of the stores of the bark was in excess of her usual outfit, some deduction must be made on this account.

3. SAME—ALLOWANCE FOR SUPPOSED STORES.

Stores which it was alleged such vessels as the H. usually carried, but which were not included in the mate's list, and as to which there was no direct evidence, *held*, disallowed.

4. SAME—DEPRECIATION OF CARGO—INVOICE VALUE THE STANDARD.

The cargo of the bark was sugar, laden at Havana. It was proved that on such a cargo as this there is a loss of weight, from Havana to New York, of from 3 to 5 per cent.; and, as the bark was lost within half a day's sail of New York, the owners of the steamer contended that a deduction to that amount

should be made from the invoice weight. *Held*, that the rule allowing the invoice value of the cargo at the port of shipment applies to the value of the cargo there as a whole, and that no deduction for natural loss or shrinkage in weight merely could be allowed.

5. SAME—AGENCY COMMISSION.

The steamer was obliged to put back to New York for repairs, and part of her cargo was there taken out and stored on the steamer's wharf. An allowance was made to the owners of the steamer for their expenses in unloading and loading again, and for storage; in addition to which they claimed an agency commission for care of cargo. *Held*, that such claim, in addition to storage, should be disallowed, it appearing that they had stored the cargo in their own buildings.

In Admiralty.

Scudder & Carter and Geo. A. Black, for libelants.

A. O. Salter, for respondents.

BROWN, J. In the above cause of collision, the court having previously held both vessels in fault for the loss of the iron bark *Helen* and her cargo, in June, 1879, (15 FED. REP. 624,) upon the coming in of the commissioner's report on damages, numerous exceptions have been filed by both parties. The examination by the commissioner of the many details of the case has been made with care, and I do not find sufficient reason to attempt any better solution of most of the difficulties presented. Some modifications as to the value of the ship and her stores should, I think, be made, with a view to require, in such cases, the production of the best evidence, rather than approve a practice which would rest content with evidence of a less satisfactory character.

1. As to the value of the bark, the libelants produced but one witness, a marine insurance surveyor and inspector. He saw her once in 1873, when he examined her for the purpose of rating, and classed her as "A1 $\frac{1}{2}$." He did not value her at that time, and had not seen her since. It was part of his business to keep posted in regard to reports of sales of vessels. No sales of iron ships, however, have ever been made in this port; and he had no actual experience, either in buying, selling, building, or equipping such vessels, and had no personal knowledge of the sales or cost of construction of iron vessels like the *Helen*, or of any other iron vessels, though he had frequently valued them for insurance purposes. This witness valued the bark, at the time of her loss in 1879, at \$15,000. This evidence was objected to by the claimants' counsel as incompetent. The commissioner at first rejected, but afterwards received it. The vessel belonged in Dundee, where her owners resided. It would not have been difficult for the libelants to prove her actual value by persons in Dundee or in England, that had knowledge of the bark and of her real value, based upon their experience in the sales of such iron vessels, or in the cost of building and equipping them, and upon their yearly depreciation. I am inclined to think that the testimony of this witness was rightly received as not wholly incompetent. His large and constant experience in the valuation of vessels generally, and his knowl-

edge, though indirect and at second hand, of reported sales and of the construction of iron ships abroad, with his valuations of them for insurance purposes here, makes him competent, I think, to give an estimate of their value when no better evidence can be had. For some purposes, in the course of admiralty proceedings, such as in appraisements for giving security, the estimates of such witnesses would be practically sufficient. But it is far from satisfactory as a sole reliance when the final question comes, how much money shall be paid for the actual value of such a vessel lost? The best evidence that can be obtained with reasonable ease and convenience ought then to be required in place of the estimates of such witnesses. There is no reason to suppose that entirely satisfactory evidence could not easily have been obtained by commission. So far as I have ascertained, the previous cases, and they are many, in which the estimates of experts have been received, these estimates were based upon a knowledge of sales of similar vessels, or of other facts bearing upon their actual cost and market value.

The libelant having rested upon the estimate of this witness, the claimant presented the testimony of a similar witness equally well qualified in general respects; but he had never seen the vessel. He estimated her value at \$13,815, which valuation the commissioner adopted. A second witness for the claimant, who also had never seen the bark, but had more practical acquaintance with the construction of iron vessels, their cost from time to time, and with sales of such ships, estimated her at \$3,000 less.

Where the best evidence presumably in the power of the libelant to give, is not furnished, lower estimates by the respondents' witnesses that are, at least, equally well qualified, ought to be adopted. Upon this ground I reduce the valuation of the *Helen* to \$12,500.

2. Somewhat similar considerations apply to the evidence submitted by the libelant as to the amount of the ship's stores and her outfit, not included in the estimate of the value of the vessel. The mate, in his original deposition in the cause, made out a list of items called "Stores on board the late bark *Helen*." The list consists of some 50 different items, beginning with "2,240 lbs. (one ton) of bread." The whole list, being valued by other experts here, amounts to \$3,769.81. About one-half of this amount is made up of five hawsers, three new sixty-fathom lines, two coils ratlines, one-inch three-line manilla; and four new sails are added, making \$418 more. The mate testified that in March previous, the ship had been fitted out for a three years' cruise; and in another place he says the bark took in stores at Havana, and at the time of the loss had some of the stores that he took in there. Here, again, no evidence was offered of the actual purchase of such a large quantity of stores, although it was presumably easily within the libelants' power to produce such proof. The mate's testimony was an estimate from recollection. The estimate of the value of a vessel, moreover, ordinarily includes her usual outfit, and em-

braces such spare sails, rope, and hawsers as are usual. There is nothing in the mate's testimony to indicate with any certainty how much of such articles was in excess of such a reasonable and ordinary outfit of the ship. Upon this ground I disallow one half of the new sails, namely, \$209.25, and one quarter of the charge for hawsers and lines, namely, \$450.

3. Three hundred dollars, moreover, was allowed upon the hypothetical testimony that such a ship must have had other articles that the mate failed to specify in his list; such as tea, tobacco, etc., which it is said such vessels always have. I cannot sanction such hypothetical charges when other evidence is in the power of the party. As respects such articles, moreover, there is no evidence that any stock worth mentioning remained on hand when the bark had arrived within a day's sail of New York; or that they were not designed to be replenished here, in the same way that other stores had been taken in at Havana. This item must, therefore, be disallowed.

4. The claimants further contended that they were entitled to a reduction of from 3 to 5 per cent. on the invoice value of the cargo of sugar, which amounted to \$19,260.57, on the ground that it was proved that there is always a shrinkage in weight to the extent of from 3 to 5 per cent. I do not think this deduction comes fairly within the rule applied in cases of collision, that adopts the value at the port of shipment rather than that at the port of destination. The rule is designed to exclude anticipated profits. The ultimate object is to determine the actual loss at the time and place of collision. This is found, say the supreme court, by taking "the prime cost, or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest, but without any allowance for anticipated profits." *The Scotland*, 105 U. S. 24, 35; *The Aleppo*, 7 Ben. 120, 133; *The Lively*, 1 Gall. 315, 322. The loss or shrinkage referred to here is not a special loss arising through any perils of the seas or washing away, which would doubtless be deducted, if proved; but the natural shrinkage in weight that accompanies all transportation of such cargoes. The "prime cost of this cargo," as it existed at the moment of collision, was its cost as a whole at Havana. Though not physically identical with the shipment at Havana, through a shrinkage in weight, it was commercially identical. The loss of weight is made up by the increase in value,—not the market value, but the intrinsic value,—which remains the same for the cargo as a whole. The intent of the rule above referred to is, therefore, carried out by retaining unchanged the gross value of the cargo as a whole, the same as at the port of shipment. This exception is, therefore, disallowed.

5. As respects the exceptions on the part of the libellant, it would appear that the omission of the proportionate part received for old copper was an oversight which should be corrected. I think also that the allowance of \$333.33 as an agency commission to the claimants

for care of the cargo must, in this case, be disallowed. They placed the cargo, or so much of it as was unladen, in buildings upon their own wharf; and they have been otherwise allowed for all the labor and expense attending it, and also a charge for the storage of it, as well as for watchmen. I do not understand that there was any additional responsibility on the part of the claimants not compensated for by these items; and when they store the goods themselves, and receive compensation for storage, and do not procure it elsewhere or by other means, I think that an additional commission cannot be allowed. *The Edward Albro*, 10 Ben. 668, 685; *The J. C. Williams*, 15 FED. REP. 558, 560.

Having deducted \$450 from the stores included in the Whitlock estimate, a deduction of 10 per cent. from the price of such articles new will be a sufficient abatement on what remains of that list, making that list of items \$2,574.28 instead of \$3,310.31.

I do not find any sufficient reason for modifying the other items excepted to on either side. The result of these modifications is to reduce the libellant's claim, with interest, by \$2,311.42, making his claim, including cargo, \$50,981.33; and to reduce the defendants' claim, including interest, by \$873.18, making their claim amount to \$7,876.39. One-half the difference between these sums is \$21,552.47, for which sum, with interest from March 24, 1885, the libellant is entitled to judgment, with costs.

Any further questions as respects liability for cargo are reserved.

AALHOLM v. A CARGO OF IRON ORE.¹

(District Court, S. D. New York. March 22, 1885.)

1. DEMURRAGE—EXCEPTIONS IN CHARTER—"FROST."

The charter of the bark E. from Carthage to New York provided that she should take on board "say 600 tons of iron ore, to be loaded and discharged at the rate of 70 tons per * * * day;" the cargo "to be received and delivered as customary," and "to be delivered as directed by the consignees," the charterers to have "the option of averaging the days for loading and discharging," etc., "lay days to commence at six o'clock in the morning, after the ship is reported, and all ready to load or discharge;" and among the exceptions to demurrage charges was hindrance from "frost." The claimants first directed the ship to Jersey City, but on the captain's objecting, they agreed that she might go to Atlantic docks, Brooklyn, and there discharge in lighters. While there, the weather became very cold, and the accumulated ice delayed the discharge by making it difficult for the lighters to be shifted in order to trim the cargo, and this libel was filed for eight days' demurrage in consequence. Two of the days were lost at Carthage. *Held*, that the wedging in of the lighters by the ice, and the consequent delay in discharge, was a result of "frost," such as to bring the delay under that exception in the charter-party.

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

2. SAME—"CUSTOMARY" MODE OF UNLOADING.

The libelants claimed that the cargo might have been trimmed faster by employing men with wheelbarrows, instead of trusting to moving the lighters. It appeared that this method was employed when the lighters became actually frozen in, and it was applied with reasonable diligence. *Held*, that such was not the "customary" mode of unloading and trimming in lighters; that the "customary" mode being all that this charter-party required, extraordinary diligence was not obligatory on the charterer to avoid the consequences of the "frost," which was excepted.

3. SAME—COMMENCEMENT OF LAY DAYS.

The charter-party provided that lay days should commence from 6 o'clock of the morning, after the vessel was ready to discharge. *Held*, that the time could be counted only from the time of the ship's actual readiness to begin the discharge, either upon the wharf or into lighters, whichever was agreed upon, both modes of discharge being in use. As she never got a berth at a wharf, and as a discharge in lighters was the mode agreed on, it was immaterial whether, under the actual circumstances, she could have discharged sooner or not, by going to a berth along-side a wharf, the captain having made no objection to a discharge in lighters, or to the place adopted.

4. SAME—TWO DAYS' DEMURRAGE.

As no excuse was offered for the two days' delay at Carthagena, and the time was not made up at the end of the voyage, *held*, that the ship should be charged for two days' demurrage.

In Admiralty.

This libel was filed to recover demurrage for the detention of the Norwegian bark *Emigrant*, in the loading and discharge of a cargo of iron ore, under a charter of that vessel from Carthagena, Spain, to New York. The charter provided that she should take on board "say about 600 tons of iron ore, to be loaded and discharged at the rate of 70 tons per weather working day of 24 hours, Sundays and holidays excepted;" the cargo "to be received and delivered in turn, as customary, at the ports of lading and discharge," and "delivered as directed by the consignees," the charterers to have "the option of averaging the days for loading and discharging, in order to avoid demurrage;" "lay days to commence at six o'clock in the morning, after the ship is reported and all ready to load or discharge, of which the captain is to give notice in writing to the shippers and consignees;" "demurrage over and above the said lay days, £8 per day of 24 hours, except in case of any hands striking work, frosts or floods, revolutions or wars, or any unavoidable accidents which may hinder the loading or discharge." The number of lay days was not specified.

The vessel took on board at Carthagena 560 tons of ore, occupying 10 weather working days, and arrived with it at New York on the twenty-second of January, 1881. After being first directed to go to Jersey City, to which objection was made by the captain, she was directed to Atlantic docks, Brooklyn, to be discharged in lighters. The discharge was commenced on the twenty-seventh of January, as soon as the bark was ready, but was not completed until the eleventh of February. Two days' time having been lost at Carthagena, the libelants claimed that but six remained available to the claimants, leaving eight days' detention, for which demurrage was claimed.

Butler, Stillman & Hubbard & Mynderse, for libelants.

Jas. K. Hill, Wing & Shoudy, for claimant.

Brown, J. The claimants, by their charter-party, had a right to direct the ship to her place of discharge. They first directed her to a dock at Jersey City. The captain objected to going there, reporting to the claimants that on inquiry he had been told that there was not sufficient water at the dock assigned. The evidence as to the actual depth of water there is, however, inconclusive and unsatisfactory. Had the unloading taken place at the dock at Jersey City, the discharge would have been made into cars rapidly and without interruption. The ship was at that time just outside of the Atlantic docks, Brooklyn. Upon this objection of the captain, the claimants told him that he might go into Atlantic docks, and that they would discharge on lighters there. The captain, accordingly, moved inside the docks, but did not get a berth along-side any wharf; and the claimants had lighters in readiness, before the ship was prepared with proper appliances, or "ready to discharge." There was some ice inside the Atlantic docks when the ship moved in; but no objection was made to this dock on that account, nor does the libel claim that the assignment to these docks was, under the circumstances, improper. The continued and increasing cold caused such an accumulation and freezing up of the loose ice within the docks that the necessary changes in the position of the lighters in order to receive the ore could not be made without numerous delays. The actual discharge commenced on the twenty-seventh of January, and was not completed until the eleventh of February, occupying 14 working days. The stipulated rate of 70 tons per day would have occupied but 8 days. I am satisfied from the evidence that the entire detention was caused through ice from increasing and continued cold weather, after the ship had taken up her position within the docks, and after the lighters were along-side. There was no delay in bringing the lighters along-side from first to last.

The customary mode of discharging iron ore in New York is either upon the dock or upon lighters. When discharged in lighters, the usual practice is to move the lighter along from time to time beneath the place where the ore is dumped. The difficulty here was that the lighters were so wedged in by the ice that great delays were caused, first, in the shifting of the lighters, in order to trim the cargo properly, and, afterwards, in trying to trim the cargo without shifting. The libelants claim that the cargo might have been trimmed faster by employing men with wheelbarrows to trim the cargo by wheeling it fore and aft, instead of moving the lighter. But that was, at best, a slow mode of loading; and it was very speedily adopted when the lighters became frozen in, and it was applied with reasonable diligence. That was not, however, the customary mode of unloading into lighters; and the "customary" mode of unloading was all that this charter-party required. In *Tapscott v. Balfour* (L. R. 8 C. P. 46, 53) it was held that these words refer specially to the mode rather than to the time of unloading; while in *Postlethwaite v. Freeland* (5 App. Cas. 599) the words

"all dispatch according to the custom of the port" were held to put the ship to all the risks of the customary disabilities and detentions of the port through lack of lighters procurable by the charterers.

If, in the present case, the detention by ice in handling the lighters during the process of unloading was a detention by "frost" "hindering the discharge," within the meaning of these words in the charter-party, then the detention in this case is within the exception of the charter, and the defendants are not liable unless the detention could have been avoided by ordinary and reasonable diligence. The evidence satisfies me that from the first all the usual men were employed, and ordinary diligence was used, for trimming the cargo and for changing the lighters; and that, when it became apparent that more men were needed to trim the cargo, ordinary diligence was used in getting additional men with wheelbarrows for that purpose. Extraordinary diligence and efforts to this end certainly are not obligatory on a charterer in order to avoid the consequences of the very cause that is contemplated and provided for in the exception. The requirement to discharge 70 tons per day was subject to this exception of "frost."

I see no reason to doubt that the obstruction in moving the lighter caused by ice, as the result of "frost," is within the meaning of this exception of the charter-party. Frost here means freezing; and it includes any freezing that would hinder or obstruct the loading or unloading of the ship. This is the most natural, if not the only, meaning that the word "frost" could have in this connection. In the cases of *Kay v. Field*, 8 Q. B. Div. 594, and 10 Q. B. Div. 241, and *Coverdale v. Grant*, 8 Q. B. Div. 600, and 9 App. Cas. 470, both of which were elaborately considered, no question was made that an impediment through ice was within the meaning of the exception of "frost" in the charter-party. But it was held that it did not apply to impediments by ice in transporting the goods from some other place to the place of loading; but only to such impediments existing at the very place of loading or unloading. Such is precisely this case. *Hudson v. Ede*, L. R. 2 Q. B. 566 and L. R. 3 Q. B. 412; *The Norman*, 16 FED. REP. 879.

The charter-party in this case provided that the time was to be counted only from 6 o'clock of the morning next after the vessel "is reported and all ready to load or discharge, of which the captain is to give notice to the consignees." This manifestly means a present readiness to commence the actual discharge. No time can be counted, therefore, as lay days, except from the time of the ship's actual readiness to begin the discharge, either upon the wharf or upon lighters. *Carsanego v. Wheeler*, 16 FED. REP. 248; *Teilman v. Plock*, 17 FED. REP. 268, and 21 FED. REP. 349; *Murphy v. Coffin*, 12 Q. B. Div. 87. The ship accepted the proposed discharge upon lighters as the mode of discharge in this case. She never got a berth along-side a wharf where she was ready to discharge in any different manner. The exceptions of the charter-party must, therefore, be applied to the

mode of discharge agreed upon and followed by the parties. *Gronstadt v. Withoff*, 21 FED. REP. 253, 255. No question arises as to what delays might have been experienced in attempting to unload at a berth along-side the wharf; for the ship never got a berth, nor attempted to get one. There is no reason to suppose, however, that she could have obtained a discharging berth instantly. The disadvantage to the ship, by that mode of discharge, might have been equally great, since, by the terms of this charter, the lay days would begin only from the time of actual readiness to discharge at the berth. Cases *supra*; and see *Robertson v. Jackson*, 2 C. B. 412; *Leidemann v. Schultz*, 14 C. B. 38; *Lawson v. Burness*, 1 Hurl. & C. 396; *Kell v. Anderson*, 10 Mees. & W. 498.

No evidence being offered to excuse the two days' delay at Carthage, and the lost time not being made up through any more rapid discharge here, so as to fall within the average clause of the charter, the libelants are entitled to a decree for two days' demurrage, and to that only, amounting to £16, with interest and costs.

GILLETT v. BOWEN.

(Circuit Court, D. Colorado. 1885.)

1. CORPORATIONS—TRUST RELATIONS BETWEEN OFFICERS AND CORPORATION—STOCKHOLDERS.

While the officers of a corporation occupy trust relations to it, and in the faithful performance of such trusts they would indirectly subserve the interests of other stockholders, trust relations to the corporation do not, as to the stockholders, create trust relations *inter sese*.

2. SAME—TRUST NOT SHOWN—EVIDENCE.

On examination of the evidence in this case, *held*, that no trust as between the parties is shown, and that the fraud charged is not proven.

In Equity.

L. S. Dixon and Thos. Macon, for complainant.

Decker & Yonley, for defendants.

BREWER, J. Out of the tangled and voluminous testimony in this case I have deduced these facts:

(1) In August, 1875, the San Juan Consolidated Mining Company was organized as a corporation, under the laws of the territory of Colorado, with a capital stock of 20,000 shares of \$100 each; the corporators being the complainant, the defendants Bowen and Tankersley, and George M. Binckley. To this corporation these several corporators conveyed certain mining claims and properties owned by them, receiving in payment therefor, each, 3,875 shares of the stock. Subsequently, and during the fall of that year, the remaining 4,550 shares were, with the exception of five shares, issued to defendant Bowen and others for the purchase of other mining properties. The four corporators above named constituted the first board of directors. Defendant Tankersley was president; Binckley, vice-president; complainant, superintendent; and defendant Bowen, secretary and treasurer. These officers remained unchanged during the transactions which form the basis of this litigation. While the stock of this corporation was large, yet, until 1880, its value was wholly speculative, a mere guess at the undiscovered bowels of the hills, so much so that in 1879 defendant Tankersley sold to defendant Bowen 3,800 shares, and a note of \$6,000, given by the corporation, for \$1,000.

(2) Whatever trifling legal business—and it was but trifling—the firm of Tankersley & Bowen, or either of them, may have transacted for complainant and Binckley prior to the organization of the company, after that time, neither as a firm nor individually were they the attorneys of, nor did they occupy confidential relations to, complainant or Binckley. In their subsequent dealings with each other in respect to stock matters, these four corporators dealt at arm's length. I consider this an important fact, for if defendant Bowen, with whom this controversy really is, either individually or as a member of the firm of Tankersley & Bowen, was the attorney of or occupied other confidential relations to complainant or Binckley, then it

devolves upon him to show the good faith and sufficient consideration of the subsequent transactions, while if not, it devolves upon complainant to show the bad faith and lack of consideration. A good deal of testimony was introduced for the purpose of showing such confidential relations, but it seems to me of the weakest and most frivolous character. It is not pretended that there was any formal retainer, or that any fees were paid. Binckley claims that he had paid Bowen in advance, in that, 20 years prior thereto, he had, as editor of a country paper in Iowa, supported Bowen in a canvass for the legislature. He seems to think that such support gave him a permanent lien on Bowen's professional services, and established life-long confidential relations. Doubtless the parties were, at the time, friendly, and as friends confided in each other. They worked together in a common effort to develop the mining properties of the corporation in which they were stockholders. As officers of the corporation, they occupied trust relations to it, and in the faithful performance of such trusts they would indirectly subserve the interests of the other stockholders. But trust relations to the corporation do not, as to the stockholders, create trust relations *inter sese*. Whatever duties they owed to the corporation, as between themselves they dealt at arm's length, and neither had special charge of the other's interests. I fail to see any satisfactory testimony showing that Bowen was ever employed by Binckley or complainant, or ever acted as an attorney in respect to their stock or individual properties, or occupied any other confidential relations to them in respect thereto.

(3) On or about the twenty-eighth of October, 1875, a contract in writing was entered into between complainant, Binckley, and Bowen, on the one side, and Tankersley on the other, by which, in consideration of \$500,000 of the stock of said company, to be delivered to Tankersley by the other parties, he agreed to purchase and put up, during the spring of 1876, on the property of said company, a 10-stamp mill and convey the same to the company. Of this \$500,000 of stock, Bowen was to give \$125,000, and Binckley and complainant the rest, in equal proportions. At the time, or within two or three days thereafter, Binckley and complainant gave \$375,000 in stock to Tankersley, and this stock is the subject of the present controversy. Now, what was the effect of this contract as to the title to this stock? Obviously to vest it absolutely in Tankersley. He did not hold it as trustee. It was not placed in his hands to be used by him as their agent in procuring the mill. It was given to him in consideration of his procuring the mill. It was payment in advance. They relied on his promise, and if he failed to perform that promise their recourse, or that of the company, the beneficiary in the contract, was not upon the stock, but against him. This is the fair interpretation of the contract as, in the bill of complaint, it is charged to have been made. It is true, complainant and Binckley say that they understood that Tankersley was to return the stock if he failed to procure the mill, and Tankers-

ley says that when he got from them the stock, two or three days after the contract, he promised to return it if he did not get the mill. But this arrangement, if made, was an after agreement, not a part of the original contract, and unknown to Bowen. So far as that contract is concerned, the stock was to be immediately delivered, and according to Bowen's testimony was, in fact, delivered as payment in advance, and the parties trusted to Tankersley's promise and responsibility for the fulfillment by him of his agreement.

(4) Soon after this contract and the receipt of the stock, Tankersley went to Chicago to make arrangements for the mill. In so going, and while there, he was at some little personal expense, the amount of which is not disclosed; neither is any repayment of these expenses by the contracting parties or the company shown, save as by the arrangement hereinafter mentioned. He did not in fact procure any mill in Chicago, but about the first of January, 1876, was notified by Bowen by telegraph not to purchase any, because he (Bowen) had obtained in Denver a 30-stamp mill. He immediately came to Denver, and there an arrangement was, on the third day of January, made between himself and Bowen on the one side, and J. B. Chaffee on the other, for the erection of a 30-stamp mill. The contract between the parties is as follows:

"EXHIBIT A.

"Memorandum of agreement made and entered into this third day of January, A. D. 1876, by and between Jerome B. Chaffee, of the city of Denver and territory of Colorado, party of the first part, and Thomas M. Bowen and Charles W. Tankersley, of the county of Rio Grande and territory aforesaid, parties of the second part.

"Witnesseth, that the said party of the first part, for and in consideration of certain stipulations and agreements hereinafter mentioned and agreed to by the parties hereto, has agreed, and does by these presents agree and bind himself, to furnish and erect, at a point to be selected by himself, and approved by the parties of the second part, in the Summit mining district, in Rio Grande county, in the territory of Colorado, a good thirty-stamp quartz-mill, complete and suitable for working gold ores, with proper machinery and steam-power for operating said mill and machinery for saving gold, together with a suitable building to cover said mill and machinery, the whole to be erected and completed at the cost and expense of the said party of the first part as early in the spring and summer of the year A. D. 1876 as is practicable, or the weather will permit.

"It is further agreed by and between the parties hereto that when said mill is completed and ready to operate, as hereinbefore mentioned, and in good running order, the said party of the first part shall have, and hereby has, the option to accept such propositions as the said parties of the second part may make, in full payment for said mill and machinery; or, in case of refusal to accept such proposition or propositions on the part of the said party of the first part, then the said party of the first part hereby binds himself to sell and deed to the said parties of the second part all of said mill and premises for their own free use and benefit, upon the following terms, to-wit: the first cost of said mill to be twelve thousand dollars, (\$12,000,) and such other cost as may arise in transporting said mill from Gilpin county to the above-named location in Rio Grande county, and also all cost and expense in erecting the same, and putting the same in running order, and completing the same, and

also the building inclosing the same. The terms of payment to be as follows, to-wit: The first twelve thousand dollars to be paid in quarterly payments at the end of each quarter from the day the said party of the first part shall decline the proposition or propositions made by the said parties of the second part; the remainder to be paid in quarterly payments in like manner, but during the following year,—the said amounts to be put into notes in amounts corresponding with the payments as above mentioned, and signed by the said parties of the second part, and drawing interest at the rate of eighteen per cent. per annum from date until paid, and secured by trust deed upon said mill and premises, and also by one-quarter of the paid-up stock of the San Juan Consolidated Mining Company, a company organized under the laws of the territory of Colorado and owning mining property in the said Summit mining district; said quarter of stock in said company amounting to five thousand dollars at par value; said stock to be held by the said party of the first part as additional security to said notes, and collateral thereto.

"It is further agreed that the said parties of the second part shall furnish, free of expense, to the said party of the first part, a good and suitable site upon which to locate and erect said mill, deeding the same to the said party of the first part at or before the commencement of erecting the same. The said party of the first part agrees to keep accurate account of all cost and expense of transporting and erecting said mill and building, together with all cost and expense of every nature, to put the same in good working condition, and exhibit the same, with all proper vouchers attesting the same.

"In case the said party of the first part shall elect to sell the said mill, as aforesaid, then said party shall deliver the same over to the said parties of the second part upon a full compliance on their part of all the stipulations and obligations relating to them herein contained.

"The proposition referred to in the foregoing, to be made by the parties of the second part, shall be made by them to the said party of the first part in writing, and at or within ten days from the time said mill shall be ready to run. In case of neglect or refusal to make such proposition, or in case of refusal on the part of said party of the first part to accept said proposition, then the said parties of the second part hereby bind themselves to take said mill and premises, and pay for the same upon the terms herein named, and to execute said notes and trust deed, and deliver the same to the said party of the first part; and the said party of the first part shall thereupon deliver peaceable possession of said mill and premises to the said parties of the second part. In case said mill is not ready to operate by the first day of August, A. D. 1876, then the third quarterly payment aforesaid shall be postponed, and not become due until sixty days after said quarterly payment would have become due by the maturity of said note.

"It is further agreed that the trust deed aforementioned shall provide that if default be made in any payment when due and payable, it shall render the whole amount of deferred payments due and payable, and notice shall be given in said trust deed of thirty days for any foreclosure. In case of neglect or failure of either party to comply with the stipulations and conditions herein mentioned, the other party shall not be bound by this agreement. In case of the death of either one of the parties of the second part a faithful compliance by the other shall be binding upon the said party of the first part.

"Witness our hands and seals, at the city of Denver, Colorado territory, this third day of January, A. D. 1876.

"JEROME B. CHAFFEE. [Seal.]
"THOMAS M. BOWEN. [Seal.]
"CHAS. W. TANKERSLEY." [Seal.]

On the next day the stock named in said agreement, to-wit, \$500,000,—\$375,000 of which was, by the admissions in the pleadings,

the stock in controversy,—was turned over to Chaffee, and the following receipt therefor given:

“EXHIBIT B.

“(In duplicate.)

“Received of Thomas M. Bowen and Charles W. Tankersley five thousand shares, of one hundred dollars each, (\$500,000,) of the stock of the San Juan Consolidated Mining Company, to be accepted as their proposition to me, as mentioned in an agreement dated January 3, A. D. 1876, between them and myself, or to be held by me as the collateral security mentioned in said agreement for the payments from said Bowen and Tankersley to myself, as I may elect to decide.

J. B. CHAFFEE.

“*Denver, January 4, 1876.*”

It will be noticed that this contract was not made between Chaffee and the company, but between him and Tankersley and Bowen. The latter were not authorized by the company to make any such contract; did not assume to act for the company in respect to it; and were personally entitled to all the benefit, and liable for all the obligations, thereof. In short, it was a purely personal contract between them and him. Whether they should turn it over to the company, and if so, upon what terms, were matters to be decided subsequently, and upon proper arrangements with the company. The fact that they were officers of the company gave it no claim upon the contract.

(5) Soon after making this contract Bowen and Tankersley returned to Del Norte and advised complainant—Binckley being away—of its terms. During the spring and summer of 1876, Chaffee proceeded with his contract, removed the mill to San Juan county, and erected it on ground belonging to the company. Obviously all parties assumed that the mill was to become the property of the company, and that it was to provide for payment of the contract price. Yet Chaffee had not agreed to accept the company as purchaser, and Bowen and Tankersley had not turned the contract over to the company. They were waiting to make something out of the transaction for themselves personally. About the first of July, 1876, Chaffee came to Del Norte, the mill being nearly completed, to arrange for payment. The cost of removal and erection was found to be \$20,000, which, with \$12,000, the first cost, made \$32,000 due Chaffee. The situation was as follows: The company had entered into no contract and made no promises. Tankersley had contracted with Bowen, Binckley, and the complainant to put up a 10-stamp mill, and received from them \$500,000 in stock as payment in advance. He had put up no 10-stamp mill. The company was the beneficiary in this contract. Chaffee had contracted with Bowen and Tankersley to put up a 30-stamp mill, and convey the same to them for \$32,000, secured by their notes and deed of trust upon the mill and mill-site, and also by \$500,000 in stock of the company. This stock he then held, it being the stock delivered to Tankersley under his contract. The mill had been put up on ground belonging to the company. After considerable negotiation it

was agreed between Chaffee, Bowen, and Tankersley that the mill should go to the company; that a deed of trust, on the entire property of the company should be executed to secure \$32,000 of notes of the company payable to Chaffee; that Chaffee should take, in full payment of his claim, \$20,000 of these notes, and the \$500,000 of stock then in his hands as collateral; and that \$12,000 of the notes should be given to Tankersley to be divided between him and Bowen in consideration of their turning the benefit of their contract over to the company, and in payment for their services in the matter; and that 10 of the stamps in the 30-stamp mill should be accepted by the company, the beneficiary, as a full discharge and satisfaction of the Tankersley contract. It is true, Tankersley denies any knowledge of, or participation in, any such arrangement; but the testimony overwhelmingly proves that his denial is not to be believed; that the arrangement was made as above stated; and that he was a party to it; and, further, that he received and retained \$6,000 of the notes, and afterwards surrendered them to the company and received new notes therefor, the latter being the notes which, with his stock, he sold to Bowen in 1879. In addition to the positive testimony of witnesses, reference may be made to the novation contract signed by Chaffee.

"EXHIBIT C.

"Know all men by these presents, that, whereas, on the third day of January, 1876, Jerome B. Chaffee entered into a contract with Thomas M. Bowen and Chas. W. Tankersley for the erection, in the Summit mining district, Rio Grande county, Colorado, of a thirty-stamp quartz-mill, complete, with machinery and steam-power for running the same; and, whereas, it has been agreed by and between said parties that said mill, machinery, and power shall be transferred and conveyed to the San Juan Consolidated Mining Company direct from said Chaffee upon the following terms, to-wit: One-third of said mill, machinery, and steam-power being to satisfy and fill a certain contract existing, whereby said Chas. W. Tankersley agreed to erect on the property of said company a ten-stamp quartz-mill, for which said one-third of said thirty-stamp mill, machinery, and steam-power it is agreed that said Chaffee shall receive in full payment therefor the \$500,000 of full-paid non-assessable stock of the said San Juan Consolidated Mining Company, now in his hands, received by him from said Bowen and said Tankersley, under said contract, dated January 3, A. D. 1876; and for this other two-thirds of said mill, machinery, and steam-power, the board of trustees of said company has agreed to pay said Chaffee the sum of \$32,000, payable in installments, and represented by eight promissory notes, secured by deed of trust on the whole of said thirty-stamp mill, and the property of said company: now, therefore, in consideration of the premises and such novation, and the sum of one dollar, paid by said parties each to the other, it is mutually understood and agreed that, by the agreements hereinbefore set forth, the said contract between the said Chaffee and the said Bowen and Tankersley, dated January 3, A. D. 1876, is fully complied with and satisfied, and each of the parties thereto are hereby fully released in the premises.

"In witness whereof, we hereto set our hands and seals this day of _____,
A. D. 1876.

J. B. CHAFFEE.	[Seal.]
"_____."	[Seal.]
"_____."	[Seal.]

—And to the bill of sale signed by Bowen and Tankersley, and written on the back of the receipt given by Chaffee in January, of the stock as collateral, which bill of sale reads as follows:

"We have sold the whole of the stock mentioned in this receipt to Jerome B. Chaffee in payment for the 30-stamp mill.

[Signed]
"August 16, 1876.

"THOMAS M. BOWEN.
CHAS. W. TANKERSLEY."

It is not, so far as the controversy between complainant and Bowen is concerned, very material whether, as an independent fact, Tankersley was party to this arrangement or not. The significance of the testimony in respect thereto is this: The complete overthrow of Tankersley's testimony, coupled with the obvious fact that, though nominally a defendant, he is really the suggester and promoter of this suit, casts large discredit on his entire testimony. In whatever of wrong was done to complainant and Binckley he was equally guilty with Bowen, and his apparent disclosures do not spring from any honest desire to make atonement therefor, but from unworthy motives as against Bowen. Under such circumstances a court may well be excused for placing little reliance upon his testimony.

(6) In pursuance of this arrangement, on the sixth of July, 1876, a meeting of the directors of the company was held, the complainant being present, and a resolution passed directing the issue of \$32,000 in notes, and the execution of a deed of trust upon the property of the company as security therefor. And on August 16th a meeting of the stockholders was also held, at which complainant was also present, and at which three resolutions were passed, the complainant voting for all of them; the first authorizing the notes and deed of trust as above, and the third reading as follows:

"Resolved, *third*, that the thirty-stamp mill complete, including crusher, transferred to this company by Jerome B. Chaffee, includes the ten-stamp mill agreed to be erected by Charles W. Tankersley; and the said Tankersley is hereby fully receipted, and a full compliance with said contract on his part is hereby acknowledged; and that the \$32,000 of notes executed and delivered to Jerome B. Chaffee shall be deemed and held full payment for the other twenty stamps, power, and machinery for running twenty stamps of same included in said thirty-stamp mill, the purchase whereof is hereby expressly authorized, ratified, approved, and confirmed."

Thereafter the notes and deed of trust were executed; Chaffee received \$20,000; Tankersley, \$12,000; \$6,000 of the latter Tankersley gave to Bowen, and with this and a note of his own of \$4,600, the latter purchased the \$500,000 of stock from Chaffee. The stock thus passed into Bowen's hands, and was afterwards sold by him. The complainant, having bought out Binckley, now claims that of this stock \$375,000 was theirs when pledged, in the first instance, to Chaffee; that no change in that respect was made with their knowledge or assent, and that Bowen, buying from Chaffee, simply bought from a pledgee with notice of the pledge; and the \$32,000 of notes secured by this pledgee having been paid by the company, they are reinvested

with full title; and that he must respond to them for the value of this stock of theirs which he has converted.

Obviously the pivotal question now is as to their knowledge of and assent to the arrangement above named, or at least so much thereof as surrendered their stock in consideration of what was received by the company. And this question is very doubtful. I have had little trouble in tracing the course of events up to this point, but upon this I am much at a loss to determine the real truth. Both Binckley and the complainant testified that they knew nothing of any such arrangement; that they were informed of the contract of January 3d, and that the stock had been put up as collateral; and never knew of any change. Bowen, on the contrary, testifies that they were both informed of the change, and assented to it. He does not claim that they were told of the manner in which the stock and notes were divided between Chaffee, Tankersley, and himself; that, he testifies, he considered a private matter between the three, in which they had no interest, but that they were fully informed that 10 stamps of the Chaffee mill were to be taken by the company as a full performance by Tankersley of his contract, and, of course, if his contract was performed, he was entitled to retain the stock.

When there is such a direct contradiction in the testimony of the parties interested, we must look at their conduct and the surrounding circumstances to ascertain the truth. These matters, I think, plainly tend to sustain Bowen's testimony, and, while I may not notice all, I will mention some that have forcibly impressed me. And *first*, it must be borne in mind that the arrangement was in fact made as stated; the third resolution passed at the stockholders' meeting, and for which complainant voted. They had agreed to give and had given this stock to Tankersley upon his agreement to put up a 10-stamp mill. Of course, when he performed this contract, even if the stock was put in his hands simply in trust, as complainant and Binckley claim, the stock became his absolutely. Their title to the stock, their right to its return, their interest in it, was then wholly gone. And in this condition complainant votes for a resolution which, after referring to the 10-stamp mill contract, reads that "Tankersley is hereby fully receipted and a full compliance with said contract on his part is hereby acknowledged." How any person of ordinary intelligence could have assented to such a resolution, and still supposed that that contract was to be considered as unperformed and set one side, and the original owners of the stock reinvested with title thereto, is difficult of comprehension. Grant that it might have been fuller and more specific, might have stated that the original donors of the stock surrendered the same and all their claims thereto to Tankersley,—and still the import would have been the same, and the meaning but little more obvious. Full compliance with the contract is, in terms, admitted. Full compliance divested them of all claims to the stock; and yet now they say that they supposed all the time that the stock was theirs.

Again, they knew that Tankersley must have been to some expense by reason of his trip to Chicago. Whether they knew all the expense to which he had gone, is uncertain. But they nowhere pretend to have reimbursed or offered to reimburse him these expenses. Can it be that they supposed Tankersley was so generous as to donate these expenses? It is true that in January, 1877, a year after the Chicago trip, the company allowed Tankersley a few hundred dollars for money advanced by him, above the \$6,000 in notes heretofore referred to, and it is possible that this allowance was for these expenses, but the testimony fails to show that it was. Again, if this stock was still theirs, why should they, owning less than half the stock in the company, advance three-fourths of the pledge. And when, as they soon did, they parted with substantially all the rest of the stock owned by them, why did not they insist that Tankersley, who had put up nothing in this pledge, should put up \$125,000, and thus release to them for disposal a like amount? Still again, a very natural inquiry which suggests itself, and it would seem must have occurred to complainant, is, of what special advantage was the stock as collateral when a deed of trust on the entire property was held? The latter took all, while the former only covered a part. I do not mean that the stock did not have some special value in view of the ease with which it could be disposed of and its proceeds applied on the debt, but that was a value more easily appreciated by a shrewd and speculative business man than by one uneducated and ignorant; and an effort is made to picture the complainant and Binckley as of the latter class.

But further, and very strongly, the subsequent conduct of the complainant and Binckley indicates, to my mind, that they understood that they had given up this stock. Within a few months both left the San Juan country, having disposed of substantially all the other stock owned by them in the county; and from that time on until about the commencement of this suit, in 1883, they acted as though they had no interest in the company. They moved from place to place, never apparently concerning themselves with any of the affairs of the company, having no correspondence with its officers, and acting towards it as any stranger might be expected to act. Statements of complainant are testified to—some of which he denies, and some he attempts to explain—which emphasize his belief that he had no remaining interest in the company. When this conduct is placed along with the fact that in the fall of 1879 a rich deposit was discovered, and that in 1880 and 1881 over \$300,000 was taken from the mine,—a fact not concealed, but notorious,—one is forced to the belief that they supposed they had no further interest in the mine, and that want of interest must have resulted from their having given up the stock in controversy, as defendant Bowen testifies, or from a belief that the pledgee had disposed of it to pay his claim. If the latter was the truth, it seems to me that, beyond question, inquiry would have been made. No man, especially no poor man, as each of the parties was, will remain silent

when a possibility of wealth belonging to him is suggested. In short, for I do not care to protract this opinion, I cannot reconcile voting for this resolution, and the subsequent indifference of the parties to the prospects and affairs of the company, with their present claim that they never knew nor assented to the giving up of this stock. It is not in accord with my convictions as to the probable conduct of ordinary men; and here I refer to what I said in the opening of this opinion, that, there being no confidential relation between Bowen and the complainant or Binckley, it devolves upon the complainant to prove that Bowen's conduct was wrongful, and not upon Bowen to prove that it was rightful. Doubts in the matter are to be resolved against the complainant. One thing more I should mention; I have spoken of complainant and Binckley as though they occupied the same position as developed in the testimony. This is not strictly true. Complainant was present at the directors' and stockholders' meeting; Binckley was not. The former's relations to the actual management of the affairs of the company seems to have been more intimate than the latter's. And still, if I may so define it, it seems to me that Bowen and Tankersley occupied one relation to the company and these transactions, while complainant and Binckley occupied another and partially antagonistic; and, further, that the relations between the two latter seem to have been such that it is only fair to presume that what one knew and assented to the other did also. Hence I have not distinguished between them, but have spoken of them as agreeing in knowledge and action. I do not know that I can add anything more to express my conclusions, or the reasons therefor, unless I were to go into the mere details of the testimony, and that would be a protracted and useless labor. My conclusion therefore is that the wrong charged upon the defendant Bowen is not proved. Of course, in the view I have taken, the matter of amendment to the answer is immaterial.

A decree will be entered dismissing the bill.

CLAYBROOK and others v. CITY OF OWENSBORO and others.

(Circuit Court, D. Kentucky. March 8, 1884.)

1. CONSTITUTIONAL LAW—ACT DISCRIMINATING BETWEEN WHITE AND BLACK IN DISTRIBUTION OF SCHOOL-FUND VOID.

Former opinion, 16 FED. REP. 297, adhered to.

2. SAME—MANDATORY INJUNCTION.

The United States circuit court for the district of Kentucky has no power to issue a mandatory injunction requiring a distribution of the money raised from taxation for public schools, under the acts of the Kentucky legislature passed in 1881, as there is no authority in said act for such distribution, and complainants have no contract which the court can enforce by affirmative relief.

In Equity.

Bagby & Marshall, for complainants.

Sweeney, Owen & Ellis, for defendants.

BARR, J. This case is before me on the merits, and after a careful consideration of the arguments presented by the learned counsel representing the defendants, I see no reason to change the views expressed in the opinion filed when the temporary injunction was granted. The schools organized and sustained in Owensboro, under the act of 1871 and its amendments, are in fact and in law part of the common-school system of this state. They may be called "public schools," but this makes no difference. These schools are common alike to all white children of school age, and are sustained by taxation. Taxation to sustain schools is permitted because the education of the children of a state is a recognized governmental purpose. If the state can constitutionally exclude colored children from all benefits arising from this tax, levied as it is for a governmental purpose, because white people pay the tax, there is no good reason why the state may not limit and distribute the benefit of government in every respect according to race or color, and in proportion to the taxes paid by each race or color. This discrimination in the benefit of the taxes raised under the act of 1871 is, I think, denying colored children of Owensboro the equal protection of the law, and within the inhibition of the fourteenth amendment to the federal constitution.

The affidavits which were before me when the temporary injunction was granted, proved that there were about 500 colored children of the school age, and about 800 white children of that age, in the city of Owensboro; but the depositions now in the record show that this was a mistake. The evidence now in would indicate there was in 1882 one colored child of the school age in said city to three white children of that age; hence, if the funds arising from taxes, raised under both the act of 1871 and the act of 1881, were distributed between the colored and white children of the school age, it would be about one dollar to the colored schools to every three dollars to the white schools. If this court had the power to issue a mandatory injunction requiring a distribution of the money raised from this tax, it should take into consideration the sums received by the colored schools under the act of 1881. But after a careful consideration of the question I cannot satisfy myself that the court has authority in this action to order the payment of any part of the money raised by and under the act of 1871 to complainants, or to the trustees of the colored schools of Owensboro. The difficulty in the way of granting such affirmative relief is that there is no legislative enactment authorizing such a use of any part of the money raised under this act, neither have the complainants, or those they represent, any contract right which this court can enforce in this action by affirmative relief.

It may be that the entire act of 1871, and amendments, is unconstitutional,—a question not now decided. But if it be assumed that the state can constitutionally levy the same rate of tax upon colored

and white people by separate and distinct acts, as has been done under the acts of 1871 and 1881, and that the only objection to the act of 1871 is that the benefits arising from the taxes raised are confined to the white race, and that the other parts of this act remain in full force, how is this court to administer this fund without legislative authority, or contract right? It is, however, the right, as well as the duty, of this court to declare a legislative enactment unconstitutional if it be unconstitutional, and, in a proper case, enjoin persons from acting under the authority of such an act.

The bill prays that on final hearing the defendants be adjudged and decreed to distribute the taxes, arising from this levy for school purposes, under the act of 1871, in accordance with law and equity, and for all proper relief in the mean time; and for a restraining order, preventing the payment out of any money raised under this law for school purposes. The temporary injunction restrained the city of Owensboro from paying out a certain proportion (5-13th) of the money raised for school purposes under this law, upon the idea that this would fully protect any right complainants might sustain upon final hearing; and I understand from the manner which the case has been prepared and argued by counsel representing complainants that if complainants cannot get from this court an affirmative order distributing to the colored schools of Owensboro a part of this fund, they do not desire an injunction prohibiting the payment of all of the money raised under the act of 1871, but only such a proportion as would cover the proportion which the colored school would receive were there a division according to the number of children of school age. If I am correct in this, complainants may have a decree enjoining and restraining the proper parties from applying to the use of the schools organized for and at which white children only are allowed to attend one-fourth of the money heretofore, or which may be hereafter, collected under the authority of the act of 1871 and its amendments. This decree will not apply to money raised and paid out prior to the temporary injunction, and will leave undisturbed the other three-fourths of the money raised under said act. If, however, counsel for complainants think they are entitled and desire an injunction restraining the collection or payment of any taxes under this act of 1871, they must give notice to the opposite counsel, and I will hear an argument upon this question either by brief or orally, or both, as either counsel may wish.

See *U. S. v. Buntin*, 10 FED. REP. 730 and note, 737.—[Ed.]

MURPHY v. WESTERN & A. R. R. and others.

*(Circuit Court, E. D. Tennessee, S. D. April Term, 1885.)***1. CARRIERS OF PASSENGERS—SEPARATION OF PASSENGERS ON ACCOUNT OF COLOR.**

A railroad company may set apart certain cars to be occupied by white people, and certain cars to be occupied by colored people; but if it charges the same fare to each race it must furnish substantially like and equal accommodations.

2. SAME—DUTY TO PROTECT PASSENGERS FROM INSULT AND INJURY.

It is the duty of a railroad company to protect its passengers from insult and injury so far as it can, and if the conductor and brakeman on a train conspire with passengers thereon to remove another passenger who has a right to be on such train, or see such passengers eject their fellow-passenger, and make no effort to prevent it, or make no attempt to repair the mischief by restoring him to his seat, the company will be liable.

3. SAME—DUTY OF PASSENGER.

While a railroad company is held to a rigid accountability as to its duties to its passengers, a passenger is required to demean himself in such a way as not to be offensive, vulgar, obscene, or coarsely disagreeable to his fellow-passengers, or expose them to suffering or danger; and if he fail in these respects he may be removed by the train-men from the train; and in such removal they may use as much, and no more, force as is necessary to his removal.

4. SAME—LIABILITY OF PASSENGER FOR TORT.

A passenger who enters a car and forcibly ejects a fellow-passenger therefrom is liable therefor.

5. SAME—MEASURE OF DAMAGES FOR EJECTION FROM TRAIN.

If a colored man enters a car set apart for white people with knowledge of that fact, so that he may be removed from the car and train for the purpose of bringing suit for damages against the railway company for such removal, the jury may consider that fact in mitigation of damages, and should not allow liberal and exaggerated compensation for his mental sufferings; but if no such intention appears, he may be allowed full and liberal compensation for his sufferings and other injuries, and such sum as punitive damages as the jury may think right in preventing the recurrence of the like mischief.

Charge to Jury.

W. J. Clift and Wheeler & Marshall, for plaintiff.

Clift, Bates & Cooke, for defendants.

KEY, J., (*orally*.) In order to be prepared to decide legal controversies justly, the judge and the members of the jury should be careful to avoid the influence of partiality or prejudice. We belong to the white race, while the plaintiff is a colored man. During the entire period of our recollection there have been bitter controversies and conflicts over the condition and circumstances, and rights of the colored race in this country. From these much bad blood, hostile feeling, and prejudice have resulted. Indeed, race prejudice, in all ages, and in all parts of the earth, has been the fruitful source of animosity and war. On the other hand, the principal defendant is a railroad, and in this state, as well as in a great part of our country, railroads have been the subjects of much denunciation and abuse, and of popular hatred. It is your duty to steer clear of all these influences upon one side as well as the other, and I believe you will do so. The ancients often painted Justice as blindfolded, so that parties could not be seen, and holding the scales with even hand. So we

should be careful not to know the parties to this suit, and to try the cause as the law and testimony demand.

Railroads have become the great instrumentalities by which the transportation of freights and passengers is conducted. The immensity of their business and extent of their powers make them the anxious objects of legal authority and regulation. They are, in a large sense, public institutions subject to public control. This regulation and control must be reasonable. The nature and vastness of their business require great skill, judgment, discretion, and capital, and they must be allowed to use and exercise the means and powers necessary to the conduct of their business.

The plaintiff in this case says that he purchased a first-class ticket for his passage over the Western & Atlantic railroad from Dalton, Georgia, to Chattanooga, Tennessee; that he took his seat in the rear car of the train without objection; that after the train started the conductor came to him and told him that people of plaintiff's color were not permitted to ride in that car, and that he must go forward into another car; that he offered the conductor his ticket, but the conductor declined to take it, and plaintiff refused to go into the forward car; that the conductor afterwards sent the porter of the train, who was a colored man, for his ticket, and he gave it to him. Not far from the same time, he says, a brakeman came to him and told him that colored people were not permitted to ride in that car, and asked him to go forward, but he refused, and the brakeman took plaintiff's baggage, without permission, into the forward car; that on the departure of the train from a station between Dalton and Chattanooga two passengers, who took the train at that station, came to his seat and seized him roughly and told him he must go into the other car, and dragged him from his seat, to which he clung as long as he could, and that, in doing so, his hand was bruised or lacerated so that it bled and pained him for some time after, and his back was wrenched so that he could do nothing for some days. These men hurried him forcibly out of the car into the forward car. That the officers and employees of the train did not interfere, though some of them saw the transaction, to prevent its occurrence. These passengers left the train at the next station, and one of them, and the conductor and a brakeman of the train, are sued along with the railroad.

The defendants do not controvert or deny that the material statements of plaintiff are true. Defendants' witnesses say that the rear car of the train was reserved as a car for ladies and those who escorted them. There were no ladies in the car; the car had few passengers, and none of them accompanied ladies. No ladies entered the car until the train reached the station upon leaving which he was ejected from the car. The train-men saw the plaintiff ejected from the car; did not interfere; did not say anything about it then or afterwards to plaintiff, or those who did eject him. The train-men say they did not conspire with those who removed plaintiff, or have any knowledge or

understanding that plaintiff was to be driven from the car. According to the testimony of defendants the young man who sold newspapers, fruits, etc., on the train, styled by the witnesses "The Butcher," and who was not in the employ of the railroad, but in that of the Southern News Company, was the active party in fomenting the trouble upon this occasion. He is examined as a witness for the defendants, and shows evident pride in the part he performed. According to his account he discovered that the train-men were not sufficiently resolute in turning the plaintiff out of the car. He appealed to the passengers to aid him in doing so. They told him that they had no objection to plaintiff's retaining his seat, as he had as much right to his seat as they had to theirs. When the train arrived at Ringgold, Georgia, two gentlemen took passage on the train, accompanied by ladies. This witness told them that they had better not enter the ladies' car, as there was a negro in it, whereupon these two passengers joined the news butcher in the expulsion of the plaintiff.

My observation has convinced me that those who are most sensitive as to contact with colored people, and whose nerves are most shocked by their presence, have little to be proud of in the way of birth, lineage, or achievement. I cannot tell how these things are as to this witness. There is no controversy as to the facts in this case. I am of the opinion that a railroad company may set apart a particular car for the use of ladies, and those accompanying them, and exclude all other passengers from it. But the plaintiff was not ejected from this car because he was accompanied by no lady, but because he is a man of color. Had he been accompanying a lady, the result, as to him, would have been the same, and she would have been required to go with him. Colored people, whether male or female, were not allowed to ride in the ladies' car. Again, I believe that where the races are numerous, a railroad may set apart certain cars to be occupied by white people, and certain other cars to be occupied by colored people, so as to avoid complaint and friction; but if the railroads charge the same fare to each race, it must furnish, substantially, like and equal accommodations. The money of one has the same value as that of the other, and should purchase equal accommodations. There is no equality of right, when the money of the white man purchases luxurious accommodations amid elegant company, and the same amount of money purchases for the black man inferior quarters in a smoking car. The law does not tolerate such discrimination on the part of a railroad company. The carrier may furnish second or third class accommodations when he charges fare accordingly. Then the passenger may choose whether he will purchase a first, second, or third class ticket, and cannot complain when he receives that which he purchased. But if the carrier sells none but first-class tickets, he must give none but first-class accommodations, unless there arise emergencies when it is impossible or unreasonable for him to do so.

A train with but two cars in which passengers could go, as in this case, and in which the ladies and their friends had one exclusively, the other car being used for smoking and for gentlemen without lady friends, does not give like accommodations to all. The passenger from the rear car may go into the forward car and smoke, but the passenger in the forward car cannot go into the rear car for any purpose. He cannot go into it to smoke or to escape the smoke, however offensive to him. Nor can a colored man and woman of genteel appearance, good repute, and good behavior, who have paid for first-class passage, be sent to the smoking car simply because they are black. As well might all red-headed men be excluded from the ladies' car because their heads are red. A railroad company may make all needful rules and regulations in the conduct of its affairs, but such rules must be reasonable and impartial,—fair to all. If it separate passengers upon the color line, it must treat each alike from the intrusion of the other. If it give white people one end of a car and colored people the other end, and exclude colored people from the white end, it must also exclude white people from the colored end. A passenger has no right to select the car upon which he will travel without direction or interference on the part of the carrier. When he proposes to take the train the train-men may designate the car which he may enter, and he has no right to complain if such car is as comfortable and convenient in its equipment as the others of like character. But if the train-men leave the cars in an accessible shape, and the passenger enters without opposition or objection and selects an unoccupied seat, and places himself in it after having purchased the ticket or paid the fare required for a seat in such car, that seat, or so much of it as is necessary for him to occupy, becomes his for the trip, unless he be promptly notified to the contrary, especially as against another passenger who afterwards comes upon the train.

The defendant, who was a passenger, and as such entered the car and forcibly removed the plaintiff from his seat and ejected him from the car, had no right to do so, and is liable for the injury. Moreover, it is the duty of the railroad company to protect its passengers from insult and injury as far as it can. If a mob, or some other power or force the agents of the road cannot overcome or oppose or resist with success, or any reasonable prospect of it, injures the passenger, the road is not liable; but if he be injured by something which the exercise of diligence, activity, and courage would have prevented, and the officers of the train fail to make an effort to prevent the mischief, the road is liable. If the conductor and brakeman conspired with the passengers to remove the plaintiff, the railroad company is liable; or, if these agents of the road saw what these passengers were doing to their fellow-passenger, and made no effort to prevent the mischief, gave it no discountenance, or made no attempt to repair the mischief by restoring the plaintiff to the seat from which he was removed, the railroad company is liable. The conductor and one of

the brakemen are sued along with one of the passengers who removed plaintiff, and with the railroad company. If these two persons conspired and confederated with said passengers to eject the plaintiff from his seat and from the car, or gave them aid and encouragement in so doing, or were present to aid and encourage, they would be personally liable. But if they did not so conspire or aid, nor were present to aid, but merely failed to prevent the act, they are not personally liable, as there was no legal personal obligation resting upon them to interfere; but if they failed to do their duty as agents of the railroad company, by reason of which plaintiff was injured, the company would be liable.

If you find against the defendants, or any of them, you may give such an amount as damages as, in your judgment, will compensate the plaintiff for his physical and mental suffering, and for his loss of time and necessary expenses, as a compensation for his injury; and then, if you think the circumstances justify it, you may allow such an additional sum as you think proper as exemplary damages. It is proper for me to say, however, that while a railroad is held to a rigid accountability as to its duties towards its passenger, there rest upon the passenger certain duties. It is required of him not to be offensive, vulgar, obscene, or coarsely disagreeable to his fellow-passengers. It is expected of him that he demean himself in such way as not to outrage the feelings of his fellow-passengers, or expose them to suffering or danger. If he fail in these, and other respects I need not mention, the train-men may remove him from it, and use as much, and no more, force as is necessary to his removal. Now, should you conclude that the plaintiff is entitled to damages against any of the defendants, and you should believe from the proof that the plaintiff placed himself in the car and pursued the course he did so that he might be removed from the car and train, for the purpose of bringing a suit,—if he sought and desired what followed,—he is not entitled to exemplary damages; nor would a jury be justified in allowing him liberal or exaggerated compensation for his mental and physical sufferings. If he sought and desired that which befell him, that fact goes in mitigation of his damages. If there is no evidence which convinces you that such was his purpose, you should give him full and liberal compensation for his sufferings and other injuries, and may allow such sum as punitive damages as you may think right in preventing the recurrence of a like mischief.

The jury rendered a verdict against the passenger defendant and the railroad company for \$217, and in favor of the conductor and the brakeman.

See *Logwood v. Memphis & C. R. Co.*, ante, 318, and *The Sue*, 22 FED. REP. 843.—[ED.]

v.23f,no.13—41

LEHMAN v. ROSENGARTEN and another.

(Circuit Court, E. D. Michigan. January 26, 1885.)

1. REPLEVIN—PLEA OF POSSESSION UNDER ASSIGNMENT UNDER STATE LAW.

It is not a good plea to an action of replevin in the federal court that the defendant holds possession of the property as assignee under a state law regulating general assignments for the benefit of creditors, and proceedings thereunder, and providing that under certain circumstances the courts of the state may enforce the trust, appoint a receiver, etc., and giving to such courts supervisory powers of all matters and disputes arising under such assignments, etc.

2. SAME—POSSESSION OF ASSIGNEE NOT POSSESSION OF COURT.

The possession of such assignee is not the possession of the court.

On demurrer to a plea in abatement.

The action was replevin. Defendant Rosengarten pleaded that his co-defendant, Schlesinger, had made to him a general assignment for the benefit of creditors, under the provisions of the state act for the regulation of such assignments; that both he and Schlesinger had complied with all the provisions of the act with respect to the acknowledgment and filing of the assignment, the filing of the bond and inventory, etc.; and that from the delivery of said assignment "continuously to the time of the service of the writ of replevin in this cause, and at the time of said service, the said defendant was in possession of the property mentioned in said writ of replevin and declaration by virtue of the trust created by said assignment, and by virtue of the provision of said acts;" and he therefore averred that at the time of the service of said writ the property mentioned therein was in the custody and under the control of the circuit court for the county of Wayne, etc. Plaintiff demurred to this plea, and defendant joined in demurrer.

C. E. Warner, for plaintiff.

John D. Conely, for defendants.

BROWN, J. The issue tendered by the pleadings in this case raises the question whether a general assignee for the benefit of creditors, under the assignment law of this state, holds possession of the assigned property as an officer of the circuit court of the proper county, or simply as a trustee for the benefit of those interested in the property; in other words, whether the property while in his possession is in the custody of the law, within the purview of the cases which hold that property in the possession of an officer of one court cannot be replevied or seized by the officer of another court. *Covell v. Heyman*, 111 U. S. 176; S. C. 4 Sup. Ct. Rep. 355; *Freeman v. Howe*, 24 How. 450; *Krippendorf v. Hyde*, 110 U. S. 276; S. C. 4 Sup. Ct. Rep. 27. Doubtless the principle of these cases also extends to an assignee in bankruptcy who takes his title directly from the court, and whose possession has always been treated as the custody of the law. *In re Vogel*, 7 Blatchf. 18; *In re Barrow*, 1 N. B. R. 481.

To my mind it is equally clear that a state legislature may enact an insolvent law of the same general nature as the federal bankrupt laws, which would vest in the trustee a possession of the insolvent's property unassailable by the process of any other court, and thus accomplish all which is claimed by the defendant in this case. *Keys Manuf'g Co. v. Kimpel*, 22 FED. REP. 466. Whether the general assignment law of this state is so far an insolvent law as to effectuate this exemption depends upon the extent to which the assignee acts under the direct authority of the court. A careful examination of its provisions, it seems to me, relieves the question of all reasonable doubt. Section 1 declares that all common-law assignments for the benefit of creditors shall be void, unless the same shall be without preferences, of all the property of the assignor, and unless the assignment, or a duplicate thereof, an inventory of the property, a list of the creditors, and a bond by the assignee shall be filed in the office of the clerk of the circuit court of the county where the assignor resides. The second section requires the assignment to be acknowledged, and gives specific directions respecting the inventory, the list of the creditors, and the bond. The third declares that every such assignment shall confer upon such assignee the right to recover all property, etc., which might be reached or recovered by any of the creditors. Section 4 provides for notices to creditors, and for filing proofs of claims "in said clerk's office." Section 5 requires the assignee to file a report "in said clerk's office" within three months after receiving such trust, etc. Section 6 enacts that in case of fraud in the assignment, or in the execution of the trust, or of the failure or neglect of the assignee in his duties, any person interested therein may file his bill in the circuit court in chancery of the proper county, for the enforcement of said trust, which court may appoint a receiver, with power to examine parties or witnesses. Additional sections were added in 1881, providing for the contest of claims in the proper circuit court, and also prescribing (section 10) that no allowance shall be made to any assignee for his compensation, etc., except upon notice to creditors that he intends to make application for such allowance. The final section (11) confers upon the circuit court in chancery of the proper county supervisory powers of all matters and disputes arising under the assignment, and authority to make all proper orders for the management and disposition of the assigned property, the distribution of the assets and avails, and the recovery of all property claimed by third persons, etc.

It is insisted by the defendant here that his possession under this act is analogous to that of an assignee in bankruptcy, and that he is therefore entitled to the same protection. A moment's consideration, however, will show that an assignee under this law, and an assignee in bankruptcy, stand in very different relations to their respective courts. Before an assignee in bankruptcy could take possession of the assigned property, there must have been a petition filed in the

district court, an adjudication of bankruptcy, a reference to the register, who held in fact an auxiliary court, proof of claims before him, a meeting of creditors called by and presided over by him, a choice by a majority of their votes, and an assignment by the register to such assignee. His only title to the assigned property was thus taken from the court itself by operation of law, and not by act of the parties. From this moment until his final discharge he was under the constant supervision of the court. He was obliged to keep regular accounts of all moneys received and expended, and to report to the court at least once in three months. He was bound to deposit his moneys in a bank designated by the court, and the moneys so deposited could only be drawn upon his checks, countersigned by the judge or register. He could not submit controversies to arbitration, or settle such controversies by agreement, except under the direction of the court. No sale of property could be made except at public auction, and no dividend paid except by instruction of the court, which was also vested with the ordinary powers of a court of chancery in respect to the supervision of the proceedings and removal of the assignee.

Upon the other hand, an assignee, under the law of this state, may collect the assets and distribute the proceeds of the entire estate, without once applying to the court, except, perhaps, to fix his compensation in case of dispute as to the amount which should be allowed him. It is true that he is bound to file a copy of the assignment, his inventory, a list of creditors, and his bond in the office of the clerk of the circuit court; but that was designed merely as a convenient place of deposit in case any person interested in the estate should wish to examine them. Proofs of claims were also required to be filed in the same office. It is also true that jurisdiction was vested in the circuit court in chancery in certain contingencies to enforce the trust, to authorize the recovery of all property claimed by third persons, and to require new bonds or sureties, but there can be no doubt that most, if not all, of these powers existed without the statute, and that, if useful for any purpose, this section was inserted out of abundant caution, or was intended to designate the precise bounds of the jurisdiction of such court in this connection.

In 2 Story, Eq. § 1037, it is said that "the trusts arising under general assignments for the benefit of creditors, are, in a peculiar sense, the objects of equity jurisdiction. For, although at law there may, under some circumstances, be a remedy for the creditors to enforce the trusts, that remedy must be very inadequate as a measure of full relief. On the other hand, courts of equity, by their power of enforcing a discovery and account from the trustees, and of making all the creditors, as well as the debtor, parties to the suit, can administer entire justice, and distribute the whole funds in their proper order among all the claimants, upon the application of any of them, either on his own behalf or on behalf of himself and all the other creditors." See, also, *Ledyard's Appeal*, 51 Mich. 623; S. C. 17 N. W. Rep. 208.

Certainly this section, conferring these powers upon the state court, would not oust the jurisdiction of this court to entertain a proper bill for the same purpose, although it will be conceded that if a receiver were appointed by either court, his possession of the assigned property would be exclusive. *Chewett v. Moran*, 17 FED. REP. 820, and cases cited. But it would be a strange doctrine to hold that an assignee chosen by an insolvent debtor could be thrust upon and made an officer of a court of justice without its authority or recognition. The position here taken is fully sustained by the following cases: *Shelby v. Bacon*, 10 How. 56; *Griswold v. Central Vermont R. Co.* 9 FED. REP. 797; *Adler v. Ecker*, 2 FED. REP. 126; *Lapp v. Van Norman*, 19 FED. REP. 406; *Mississippi Mills Co. v. Ranlett*, 19 FED. REP. 191.

The demurrer to the plea in abatement is therefore sustained.

GOLDSMITH v. GILLILAND and others.

(Circuit Court, D. Oregon. May 20, 1885.)

1. BOND OF A GUARDIAN.

Under section 10 of the act of December 16, 1853, (Laws, Or. 739,) the security required of a guardian, licensed to sell the real property of his ward, is a writing obligatory or "bond" in a definite sum, and upon the conditions therein specified, and not a mere "undertaking;" and such bond must be given in such sum as the county judge may direct, and with such sureties as he may approve.

2. SAME—WHO MAY QUESTION SALE ON ACCOUNT OF.

No one can question the validity of a guardian's sale for want of sufficient security given by him, except the ward or some one claiming under him.

Suit to Determine Adverse Claim to Real Property.

George H. Williams, for plaintiff.

James F. Watson, for defendants.

DEADY, J. This suit is brought by the plaintiff, a citizen of New York, to have his title to an undivided five-eighths of the Danforth Balch donation quieted, as against the claim of the defendants, citizens of Oregon, of an estate or interest therein adverse to him.

In his amended bill the plaintiff derails his title to the premises from the donee of the United States, Mary Jane Balch, the wife of Danforth Balch, and in so doing shows that on May 4, 1868, the eight minor children of said Danforth and Mary Jane Balch were the owners of the premises, as tenants in common, subject to a life estate therein, for the life of their mother, when one C. S. Silver was appointed by the county court of Multnomah county, their guardian; that on July 12, 1870, said Silver obtained an order from said court to sell the interests of four of said children in the premises, which he did on September 24, 1870, and conveyed the same to the purchaser under whom the plaintiff claims.

The defendants demur to the amended bill, for that the "complainant hath not by his own showing made out a case which establishes his right, title, or interest;" and on the argument thereof made the point that the guardian's sale was invalid, and no title or interest passed to the purchaser thereat, because it does not appear that the guardian, before making such sale, gave a bond as required by statute.

By section 10 of the act of December 16, 1853, (Laws Or. 739,) it is provided that a guardian, before selling the real property of his ward, shall "give bond to the county judge * * * with sufficient surety or sureties, with condition to sell the same in the manner prescribed for sales of real estate by executors or administrators, and to account for and dispose of the proceeds of the sale in the manner provided by law."

By section 20 of the same act, (Laws Or. 740,) it is provided that in any action relating to property sold by guardian under said act, in which "the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings: provided it shall appear," among other things, that the guardian "gave a bond that was approved by the county judge."

In *Gager v. Henry*, 5 Sawy. 245, this court held that a sale by a guardian, when authorized by a court of competent jurisdiction, could not be questioned collaterally, except as allowed by this section of this act. See, also, *Hobart v. Upton*, 2 Sawy. 302. Upon this point the amended bill states that the county court licensed the guardian to sell the property "upon his giving bond in the sum of \$6,000 as prescribed by law, which bond was accordingly given and approved by said court."

The argument in support of the demurrer assumes that the word "bond" in this act is used as a synonym with the word "undertaking," and that the court had no power to limit the amount of such undertaking to \$6,000 or otherwise, but that the same should have been given generally as a security that the property would be duly sold and the proceeds, be they more or less, duly accounted for; and because this was not done counsel insists that the act was not complied with in this particular, and therefore the sale was invalid and the purchaser took nothing under it. In the primary sense of the word, an "undertaking" is simply a promise. But in modern times, it is most frequently used to signify a written promise, not under seal, made by a party in the course of legal proceedings as a prerequisite to obtaining some special process, order, or allowance in his cause. In proceedings according to the Code of Civil Procedure, it has taken the place of the "bond," and is given without limit as to the liability of the undertakers, unless otherwise specially provided by statute. *State v. Mahoney*, 8 Or. 207. But a "bond" is a writing under seal, by which the maker or obligor acknowledges himself indebted to another, called the obligee, in a specified sum, which he thereby "binds" him-

self to pay. If taken as a security for the performance or forbearance of any act, a clause is added, called a condition, in which the circumstances leading to its execution are recited, and by which it is in effect provided that if the obligor shall perform or forbear accordingly that the obligation shall be void.

When the act of 1853 was passed the word "undertaking," in the sense of a substitute for a bond, was unknown to the legislation of Oregon. But at the same session sundry acts were passed regulating the practice in the courts, which were taken from the New York Code of Civil Procedure. In these the term was first used. But there is not the slightest ground for supposing that the legislature used the term "bond" in the sense of "undertaking," or otherwise than in its well-known and universally understood legal sense. Now, one of the essentials of a bond is that the obligor shall acknowledge himself indebted to the obligee in a definite sum. Without this a bond cannot be given. Therefore, when the act required the guardian to give a "bond to the county judge," conditioned as therein provided, it in effect required him to give security for the faithful performance of his trust, in such sum and with such sureties as such judge might direct and approve.

The county judge before whom the proceeding is had has the means of knowing the probable value of the property, and the statute trusts him, as it must some one, to fix the amount of the bond at a sum sufficient to make it ample security to all concerned. And this view is fully confirmed by subdivision 1 of section 20, which in effect declares the sale legal in this respect, whenever it appears that the guardian "gave a bond that was approved by the county judge." This the bill shows was done in this case, and it is sufficient. But I do not perceive that the defendants are in a condition to raise this question. They have not yet answered and disclosed the nature of their claim, and therefore it does not appear whether they claim under the wards in this sale or adversely to their title. Taken together, sections 20 and 22 of the act provide that if the party contesting the validity of a guardian's sale claims under the ward, it must appear, among other things, that the guardian gave a bond to the approval of the county judge; but if the person questioning such sale claims adversely to the title of the ward, then it is only necessary that it should appear that the guardian was authorized to make the sale, and "that he did accordingly execute and acknowledge, in legal form, a deed for the conveyance of the premises."

Whatever may be commonly known or understood about the nature of the defendants' claim to this property, the court cannot assume or take notice that they claim under the wards of the guardian who made this sale, and until that fact appears they cannot be heard to question the validity of such sale on the ground of the insufficiency of the surety given by the guardian. The demurrer must be overruled, and it is so ordered.

BLAKEMORE and others v. HEYMAN.

(Circuit Court, D. Kentucky. April 5, 1881.)

COTTON EXCHANGE—SALE—MARGINS—CUSTOM.

In the absence of a special agreement or proof of knowledge of a custom of the cotton exchange of New York, a broker in that city who sells cotton before maturity of the contract, because of a failure on the part of his principal to advance margins, cannot recover from such principal the amount of loss sustained by reason of such sale.

At Law.

Henry Burnett, for plaintiffs.

J. C. Gilbert, for defendant.

BARR, J. This is a suit to recover a balance of \$687.19, which plaintiffs alleged they paid for defendant at his instance and request. Plaintiffs are commission merchants, doing business in New York, and are members of the Cotton Exchange of that city. They deal in produce on commission. The defendant is a dry goods merchant, doing business in Henderson, Kentucky. Plaintiffs bought on the Cotton Exchange, New York, for defendant, 100 bales of cotton, to be delivered February, 1879. This contract matured, and they say they closed it out according to the rules and regulations of the Cotton Exchange, and there was a loss of \$44.75. They, at the request of defendant, sold, March 24, 1879, for his account, 100 bales of cotton, June delivery. They sold March 26, 1879, upon like request and account, 100 bales of cotton, July delivery. These sales were made on the Cotton Exchange, and at the prevailing rates. Plaintiffs then had on hand as margin \$550, less the \$44.75 loss on the purchase of 100 bales of cotton for February delivery. The market advanced, and plaintiffs demanded of defendant additional margin, and he sent them April 1, 1879, \$75, and promised April 3, 1879, to send them \$300 more, but failed to do so. The plaintiffs, on the fifteenth April, 1879, covered these outstanding contracts by the purchase from two members of the Cotton Exchange the same amount of cotton and same delivery, June and July. The cotton thus purchased cost more than the price for which the cotton was sold in March. The difference was settled as of the fifteenth of April, and the contracts which were entered into April 15th substituted for the March contracts, and thus the transaction was closed, and plaintiffs released from any further liability. The loss on the contract for the June delivery was \$679.25, and on the contract for the July delivery was \$578.25. These sums, together with the plaintiffs' commission, after deducting the margins in their hands, made the balance of \$687.19 sued for.

The defendant admits the employment of plaintiffs and the sending of the margins to them, but puts in issue every other material allegation of the petition. He denies that there was a sale in March of the cotton as alleged, or that there was a purchase in April. He de-

nies all knowledge of the rules and regulations, or customs, of the New York Cotton Exchange. He also alleges that any contract or contracts which plaintiffs entered into were with the express understanding that only the difference should be paid, and that they were really only wagers upon the rise and fall of the market, and void.

I have carefully read the evidence, and need only consider whether or not plaintiffs had the right to close out the June and July deliveries on the fifteenth of April, because defendant failed to put into their hands the margin required by them of him. There is no evidence proving or tending to prove that there was a special agreement between the parties which authorized the plaintiffs to close out these contracts in advance of their maturity, because of the failure of defendant to put up margins to cover the fluctuation of the cotton market in New York. This right is sought to be derived from the rules and regulations of the New York Cotton Exchange, and the custom prevailing in the New York cotton market. All knowledge or notice of the rules and regulations of the New York Cotton Exchange is denied by defendant, and he reiterates these denials in his testimony. The plaintiffs have failed to prove defendant's knowledge of these rules and regulations, or that he agreed to be bound by them in his dealings with plaintiffs, or that the contract between plaintiffs and defendant was to be controlled or governed by them. Indeed, there is no affirmative evidence upon this subject, other than the fact the dealings were upon margins, and that defendant seemed to have recognized plaintiffs' right to call for additional margin. But, as far as I can see from the evidence, never at any time has defendant waived his legal rights, in the event he failed to put up margin as required by plaintiffs. In the absence of an agreement, plaintiffs had no legal right to close out contracts on the fifteenth of April, which did not mature until June and July.

The laws, rules, and regulations which govern the members of the New York Cotton Exchange, can have no effect upon defendant's legal rights, as he did not know of or acquiesce in them. If, however, it be conceded that defendant is bound to repay to plaintiffs all losses which they incurred in accordance with the laws and rules governing the New York Cotton Exchange, I should be disinclined to give judgment in favor of plaintiffs, because it is not shown they were compelled to do as they did. The parties to whom they allege they sold the cotton were Waldo & Dayton, plaintiffs' brokers, and they nowhere prove that Waldo & Dayton required of them more margin than defendants had already furnished them, nor indeed that any demand for margin had been made of them or would be made. Plaintiffs' call for an additional margin was, as far as this record shows, made for plaintiff's own protection, and not because margins had been demanded of them.

In regard to a custom in New York outside of the Cotton Exchange, which Mr. Watts, president of the Cotton Exchange, attempts to prove,

it is sufficient to say that no such custom is pleaded, nor is there any evidence tending to prove defendant's knowledge of it, or that it is a well-known usage or custom. In order to have "commercial usage take the place of general law, it must be so uniformly acquiesced in, and for such a length of time, that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract." *Lyon v. Culbertson*, 83 Ill. 37.

The plaintiffs have failed to sustain their action, and judgment will be for defendant, and his costs expended therein.

YSTALIFERA IRON CO. v. REDFIELD and others, Ex'rs.

(*Circuit Court, S. D. New York. April 30, 1883.*)

CUSTOMS DUTIES—BOXES OF TIN PLATES—REAPPRAISEMENT—EXAMINATION OF BOXES—ACT OF AUGUST 30, 1842.

Plaintiff imported in 1853, from Liverpool, 1,300 boxes of tin plates of four different kinds, and of different value, and one box of each kind, being four boxes in all, were designated by the collector for examination and appraisal, and on appraisal increased duties and a penalty were imposed. Plaintiff paid the penalty and increased duties under protest, and brought suit to recover the amount. *Held*, that the act of August 30, 1842, §§ 16, 17, 21, under which the appraisal was made, required one in every ten boxes to be examined and appraised, and that no waiver of the statute being shown, the increased duties and penalty imposed were illegal, and that plaintiff was entitled to recover.

At Law.

A. W. Griswold, for plaintiff.

H. R. Wilson, Asst. Dist. Atty., for defendants.

SHIPMAN, J. The case shows that in 1853 the Ystalifera Iron Company, of Swansea, Wales, consigned, for its account and upon its risk, to Naylor & Co., of the city of New York, 1,300 boxes of tin and terne plates manufactured and owned by said iron company. Said goods were sent by way of Liverpool, and arrived by the ship *Sidons* about August 29, 1853. The invoice and entry contained four different kinds or brands, of different values, viz., 600 boxes terne plates, marked I C; 333 boxes, I C, tin plates; 137 boxes, I X, tin plates; and 230 boxes, W I C, tin plates. The invoice was presented for entry at the custom-house on August 29, 1853. The dutiable value was estimated upon the invoice valuation, being the value at the time and place of the manufacture of the goods, at \$8,133.14, and the duties thereon were properly estimated to amount to \$1,219.95, which were paid by Naylor & Co., without protest, on September 3, 1853. One box only of each mark or brand of the importation, being four boxes in all, were designated by the collector for examination and appraisal, and were removed to the public stores. A penal redelivery bond was given to the collector, as provided in section 4

of the act of May 28, 1830, (4 St. at Large, 410,) a permit for 1,296 boxes was given to Naylor & Co., and they received these boxes between September 10, 1853, and October 1, 1853. The invoice valuation was raised more than 10 per cent. by the government appraiser on September 12, 1853. Upon appeal by the consignees there was a reappraisement, on September 14, 1853, by a merchant appraiser and the general appraiser. The former took the oath required by law, and examined only two or three of the sample boxes which were in the public stores. The general appraiser examined no more than the four sample boxes. The two differed in their appraisal, the merchant appraiser increasing the invoice value somewhat, but less than 10 per cent., and the general appraiser adhering to the previous appraisal. The collector decided in favor of the appraisal of the general appraiser. The reappraisers appraised at Liverpool, without reference to Swansea, prices, and founded their opinion upon Liverpool prices current. The merchant appraiser deducted from the quotations in the circulars, because the value of the Ystalifera goods at Liverpool was less than that which was given as the ordinary market price. The increased duties in consequence of this appraisal were an additional duty of \$140.70, and a penalty of \$575, which were paid by the consignees on December 8, 1854, under and after written protest distinctly and specifically setting forth the grounds of objection to the payment of the duties, and under compulsion, partly in order to get the four boxes of plates upon which the duties were imposed, which were still in the public stores, and especially to prevent a permanent refusal by the custom-house officials to receive the bonds of their firm. There was no evidence of the waiver of the statutory requirement that one package in every ten packages in an invoice should be examined and appraised.

The decision by the reappraisers of the question what markets of the country from which the goods have been imported are the principal ones for the goods in controversy, and their appraisal, made in accordance with the examination which is required by statute, are final. But the statute (act Aug. 30, 1842, 5 St. at Large, 563-565, §§ 16, 17, 21) required that one package in every ten packages of the merchandise to be appraised must be designated by the collector and must be examined, and there must be, in substance and effect, a faithful personal examination by the reappraisers of the number of packages which are required to be examined and appraised, or such an examination of the samples drawn from such packages as is equivalent to an examination of the packages themselves. If such examination is not had, the reappraisal is invalid, and the excess of duty or the penalty that is imposed by reason of any increased valuations above those stated in the invoice is illegally imposed. *Greely v. Thompson*, 10 How. 235; *Greely's Adm'r v. Burgess*, 18 How. 413; *Burgess v. Converse*, 2 Curt. C. C. 216; *Stairs v. Peaslee*, 18 How. 521; *Belcher v. Linn*, 24 How. 508. If a faithful examination was

not had of the number of packages which the statute required to be examined, or of the samples drawn from such number of packages, there was no power in the reappraisers to make an appraisal. In this case but four packages, being one only of each of the four different brands of plates, and the aggregate number of packages being 1,300, were sent to the public stores for examination, and were examined. Any examination of such packages only must be inadequate, unless further examination is waived. The illegality is sufficiently pointed out in the twenty-seventh ground of protest, taken in connection with the sixteenth ground. No objection was taken by the defendants to any defect in the protest.

Let judgment be entered upon the verdict for \$715.70, with interest from December 8, 1854.

WINDMULLER and others v. ROBERTSON.

(Circuit Court, S. D. New York. May 8, 1885.)

1. CUSTOMS DUTIES—BEANS—ACT OF MARCH 3, 1883.

All ordinary beans are subject to a duty of 10 per cent. 22 St. at Large, 488, 517, 520.

2. SAME—VERDICT—MISTAKE AS TO AMOUNT.

In an action to recover excessive duties, where the jury, by mistake in calculating the amount of duties illegally exacted, render a verdict for too large an amount, such verdict may be sustained on remitting the excess, and a new trial refused.

At Law.

Henry E. Tremaine, for plaintiffs.

Sam'l B. Clarke, for defendant.

WHEELER, J. This is a suit to recover back duties exacted under the act of March 3, 1883, (22 St. at Large, 488,) upon importations of beans. Under this act, drugs, barks, beans, etc., not edible and in a crude state, (517,) and plants, trees, shrubs, and vines of all kinds not otherwise provided for, and seeds of all kinds, except medicinal seeds, not specially enumerated or provided for, (520,) are free; and vegetables, in their natural state, or in salt or brine, not specially enumerated or provided for, are, in Schedule G, under the head of provisions, made subject to a duty of 10 per centum, (504;) and garden seeds, except seed of the sugar beet, are made subject to a duty of 20 per centum. A duty of 20 per centum as for garden seeds was exacted. The importers protested that the beans were free as seeds, or subject to a duty of 10 per centum only. The jury, under instructions, found that the beans were neither garden seeds, nor seeds in the sense of the statute, and returned a verdict for the excess above 10 per centum. The principal question now is as to the correctness of this finding.

Beans are vegetables, and are mentioned as examples of such in Webster's Dictionary. They are raised for food, and properly fall under the head of provisions. They are not specially enumerated or provided for anywhere in the act, unless they are under the general name of "seeds" or "garden seeds." A few only of all that are raised are used for seed. They are not commonly spoken of as seeds, but are known as an article of food by their name of beans. Those not edible are free by the other provision of the act. If that division had not been intended for the purpose of leaving those edible dutiable with other provisions, it would be useless. The fair meaning of all these provisions of this act seems to be to make all ordinary beans dutiable at 10 per cent. The verdict, being in accordance with this view, appears to be right as to this question.

The payment of 20 per cent., for which the verdict was rendered, was not made until after this suit was brought, but this fact was not made known, and no question which it would affect was raised at the trial; but, by an apparent mistake in computation, the verdict was for \$715.29, when the excess actually paid, with interest, amounted to only \$571.50. The defendant insists that the verdict should be set aside unless the plaintiffs remit the excess; and that then it should be, unless the recovery would be a bar to any future recovery for the same payments. Of course the excess should be remitted or the verdict set aside. The plaintiffs do not claim to the contrary of this. And it is the former recovery, not the recovery upon any particular form of pleading, or order or regularity of procedure, that satisfies the right of recovery and constitutes the bar. No error was committed at the trial in this respect, and this irregularity, if one, furnishes no ground for a new trial.

On the filing of a remitter of \$143.79 within 10 days, let judgment be entered on the verdict for the balance; and on failure to file such remitter within that time, let an order be entered setting aside the verdict.

HARRISON and others v. MERRITT.

(Circuit Court, S. D. New York. May 8, 1885.)

CUSTOMS DUTIES—BONE-BLACK—REV. ST. § 2504.

Bone-black is not included in the clause, "bones crude, and not manufactured, burned, calcined, ground, or steamed," in the free-list of section 2504 of the Revised Statutes.

At Law.

Henry E. Davies, for plaintiffs.

Elihu Root, U. S. Atty., and Sam'l B. Clark, Asst. U. S. Atty., for defendant.

WHEELER, J. The question in this case is whether bone-black is included in the clause, "bones crude, and not manufactured, burned, calcined, ground, or steamed," in the free-list of section 2504 of the Revised Statutes. The evidence showed that it is made by subjecting bones, after being steamed and cleaned, to destructive distillation by heat in close vessels, until all is expelled but the carbon, and then crushing that, and assorting the pieces into proper sizes for clarifying sugar. The jury has found thereupon that bones so treated, are not manufactured more than by being burned, calcined, ground, or steamed. The defendant has moved for a new trial, principally upon the ground that this finding is not supported by, and is contrary to, the evidence. Bones are understood to be calcined when they are subjected to heat in open vessels so as to produce bone-ash, by being made friable; and to be burned when subjected to the direct action of fire. This distillation appears to be different from either. And the crushing and assorting is an important part of the process. By the whole a new article is made from bones. They are not treated thus for the purpose of securing them, or making them portable, as grass is made into hay, without becoming manufactured, as was held in *Frazee v. Moffitt*, 20 Blatchf. 267; S. C. 18 FED. REP. 584; or as apples are cut and dried, as in that case mentioned. The bones are manufactured into bone-black by processes of several steps. *Schriefer v. Wood*, 5 Blatchf. 215; *Peters v. Robertson*, 20 FED. REP. 818. These steps amount to more than either of those allowed by the statute without making the result dutiable. The verdict for these reasons appears to be contrary to the weight of the evidence, and ought, therefore, to be set aside.

Verdict set aside, and new trial granted.

LEECH, Assignee, v. DAWSON and others.

(District Court, D. Kentucky. July 28, 1884.)

BANKRUPTCY—STATUTE OF LIMITATIONS—ACTION BY ASSIGNEE AGAINST BANKRUPT CLAIMING LAND AS HOMESTEAD.

The limitation prescribed by Rev. St. § 5057, applies to a suit by an assignee in bankruptcy against the bankrupt, to recover land fraudulently claimed and retained by the bankrupt as his homestead.

In Bankruptcy.

Gilbert, Reed & Darby, for defendants.

Henry Burnett, for complainant.

BARR, J. B. N. Dawson was adjudged a bankrupt in May, 1876, and James H. Leech, now deceased, was appointed his assignee, and the register made deed in June, 1876. The assignee, in October, 1876,

filed his report describing the land which had been set apart to the bankrupt as a homestead thus, viz.:

"Two hundred and fifty acres of land in Hopkins county, Kentucky, near the town of Dawson, upon which said B. N. Dawson and his family now reside as a homestead."

The land in controversy is within the town of Dawson, if Dawson embraces the whole of a plat of ground which the bankrupt had made some years before his bankruptcy, and under which he had sold lots. The plat had never been recorded, nor had the town of Dawson been incorporated as a town; but, as there was to be a depot on the place, the bankrupt concluded to establish a town, and had for that purpose a plat made, in which some 25 or 30 acres was laid out by streets, and lots fronting thereon. He sold small lots in 1872 or 1873, but the town did not grow, and at the time of Dawson's bankruptcy the actual town consisted of a few houses immediately around the depot. The land in controversy is not, therefore, within the town of Dawson, but "near" it, if the town of Dawson meant the actual town.

This description of the homestead must be read by the light of surrounding circumstances, and much evidence has been taken by the parties in this controversy. There is quite a conflict in this evidence on some material points. The plea of the statute of limitations is made, and that question should be disposed of first. The 5057th section, Rev. St., provides that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against said assignee." This is taken from section 2 of the act of 1867, and is substantially the same upon this subject as the eighth section of the bankrupt act of 1841. The complainant alleges that the bankrupt fraudulently concealed this land from the assignee, Mr. Leech, and omitted it from his schedule, with the fraudulent intent to prevent it from being sold by him; but this is not sustained by the evidence. In the schedule made by the bankrupt, and in his claim to have the land allotted, he described his land thus:

"A tract of land of about 250 acres, with ordinary dwelling-house and usual out-houses on it, situated in Hopkins county, Ky., near the town of Dawson, which the petitioner now lives upon, occupies as a home and farm for the support of himself and family, and which the petitioner claims under the statute of Kentucky as a homestead."

We think, without going into the detail of the evidence, that the bankrupt did claim the land in controversy, and that, after the allotment of his homestead, he supposed, as did the assignee, Mr. Leech, that it embraced all of the land which he owned, except those lots which he (bankrupt) had sold and gotten back. These lots are not now in controversy. The whole of the land, including that in con-

troversy, was not worth more than \$1,000, and its subsequent advance in value, caused by the discovery of mineral water in Dawson, is, of course, not to be considered. Dawson died in 1877, and after his death, his wife and family continued to live on the homestead until it was sold. The land in controversy was not sold, but was claimed in a general way by the guardian of the children of the bankrupt, and in 1882 he obtained a decree of the Hopkins circuit court to sell this land, and did sell in November, 1882. This suit was brought April 7, 1883, so that the limitation bars if it applies to this case.

In *Phelps v. McDonald*, 99 U. S. 306, the assignee of a bankrupt brought a suit to recover a large sum which had been awarded to the bankrupt by the British government, but to be paid by the United States. The bankrupt claimed to be a British subject, and got this award for cotton burned during our civil war. The award was made in 1873, and the suit brought in September, 1874. The bankrupt claimed under a purchase of his assets, but the court held that purchase was fraudulent and void, and that the claim was still the property of the assignee. In the course of the opinion the court say:

"The bankrupt law required that all suits by or against the assignee should be brought within two years from the time the cause of action accrued. Rev. St. p. 782, § 5057. But this provision relates to suits by or against the assignee with respect to parties other than the bankrupt. In a case like this it has no application. If this were otherwise, the cause of action here did not accrue until the award was made, and McDonald (bankrupt) set up a claim to the fund awarded. *Clark v. Clark*, 17 How. 315."

The case of *Clark v. Clark*, 17 How. 315, was a case almost identical with the *Phelps v. McDonald* case, and arose under the eighth section of the bankrupt act of 1841, which in terms, as to limitation, was the same as the act of 1867. In that case the language is almost identical with that used in *Phelps v. McDonald*. The court say:

"The interest adversely claimed, and which the statute protects if not sued for within two years, is an interest in a claimant other than the bankrupt; but supposing Ferdinand Clark had been placed in that condition, as to the fund in the treasury, by his pretended purchase of his own assets, yet as no cause of action accrued to the assignee in bankruptcy against Clark until he got possession of the money, and as he never held the fund adversely, it follows that the act does not apply; but if it did, the fund had no existence until the award was made, which was only thirty days before the suit was brought."

It will be seen that while both of the opinions state in broad terms that the act does not apply to a suit by or between the assignee and bankrupt, the question is not discussed, and in both cases the court say no cause of action accrued until the award, which was within less than the two years. Again, the court say, in the *Clark Case*, that no cause of action accrued until the bankrupt obtained the money; and as he never obtained the money, but it was still in the treasury, there was no adverse holding by the bankrupt.

In the case at bar the homestead of the bankrupt did not pass to the assignee by the register's deed. This, by the express terms of

section 5045, did not pass to the assignee. It is true that the determination of the matter of homestead and exemption is left with the assignee, subject to revision by the court; but I presume that a claim in the schedule of a specified homestead is in the nature of an adverse claim, and that, after the bankrupt's assignee has determined the question of homestead, and the bankrupt claims and has possession of land as part of his homestead, that is an actual adverse holding against the assignee. While the homestead does not pass to the assignee, still he has a right to determine whether the claim of the bankrupt is just and proper, and all else, except the exemptions and homestead, does pass to the assignee. Whatever is shown by the bankrupt not to have passed, but to be his homestead, is held adversely to the assignee after his determination is made and reported by him. If the land claimed under such circumstances is really the bankrupt's homestead, it has never passed to the assignee. If, however, there is a doubt, because of the description or other cause, the possession and claim of the bankrupt, that it is part of his homestead, is and must be an adverse claim. It will be observed that there is nothing in this section confining the limitation to suits between the assignee and persons other than the bankrupt. The language is, "between an assignee in bankruptcy and a person claiming an adverse interest."

The bankrupt is very rarely in condition to claim an adverse interest to his own assignee; but if, in fact, he does have possession, as in the case at bar, claiming it as part of his homestead which never passed to his assignee, I can see no good reason why this statute of limitation should not apply. It is not under the assignee, but adverse to him. Whatever my own opinion upon this subject might be, it would be controlled by the case of *Phelps v. McDonald*, 99 U. S. 298, if I construed it as a decision upon this point. The court say that "the cause of action did not accrue until the award was made, and McDonald set up a claim to the fund awarded." If this was true, of course the two-years limitation did not apply, as the award was made only one year before the suit. So, in the *Clark Case*, 17 How. 315, the award was only three months before the bringing of the suit. While it is true that in both of these cases the supreme court say that the limitation does not apply to suits between the bankrupt and his assignee, in both the court say that if he had applied, it would not bar, because the cause of action accrued within the two years. The reason for this provision of the law was to force prompt settlements of bankrupts' estates, (*Bailey v. Glover*, 21 Wall. 342,) and this reason applies with equal force to the prompt adjustment and final settlement of the question of homestead exemption, as any other connected with the settlement of the bankrupt's estate. The supreme court has determined recently that this limitation applies to the receiver of debts due the bankrupt's estate by third parties, thus giving a broad construction to the words "claiming an adverse interest," in this section, (*Jenkins v. International Bank*, 106 U. S. 574; S. C. 2 Sup. Ct.

Rep. 1,) and that court has indicated a purpose to give a liberal construction to this limitation, and apply it rigidly to all suits covered by its terms.

I have looked with diligence for a direct authority on the question under consideration, but have found none. I must therefore decide this question as I understand the language of this section, which, I think, applies to all persons claiming an adverse interest to the assignee; the bankrupt as well. There is not sufficient evidence of a fraudulent intent or a fraudulent concealment of the property in contest. Indeed, I think the proof makes it clear that the present controversy has arisen from a loose description in the schedule, and consequently in the report of the assignee of the homestead assign; but there was no intentional fraud.

The question of whether or not the land in controversy was, in fact, a part of the homestead, as recognized by the assignee, need not be decided, as I think the suit is barred by the two-years limitation.

The bill and cross-bill should be dismissed, with costs; and it is so ordered.

UNITED STATES v. ROGERS.

(District Court, W. D. Arkansas. April 27, 1885.)

1. CRIMINAL LAW AND PROCEDURE—MOTION FOR WARRANT OF REMOVAL.

In acting on a motion for a warrant of removal, the judge is performing a judicial function, and in the performance of such function he may look into the proceedings of the commissioner, or the court in which the indictment was found, for the purpose of enabling him to properly determine questions pertaining to the removal and grant or refuse the order accordingly.

2. SAME—QUESTION FOR DECISION OF JUDGE.

The question the judge is called to pass on in a proceeding for removal is, where the case is to be tried, where a trial can be had. In passing on the question, the judge can go behind the indictment. He must inquire where a trial can be had. He must send the party to the court which has jurisdiction to try. The judge is to determine for himself whether the party charged should be held or removed or discharged.

3. SAME—JURISDICTION.

Jurisdiction can be raised at any stage of a criminal proceeding. It is never presumed, but must always be proved, and is never waived by a defendant. Jurisdiction to try, embraces jurisdiction of the person, of the place, and of the subject-matter. There must be a concurrence of all of these to give the right to try.

4. SAME—OBJECTION, HOW RAISED.

The person accused and who is asked to be removed, can raise the question of jurisdiction without invoking the aid of the writ of *habeas corpus*, or he may do so by the aid of such writ.

5. SAME—REV. ST. § 1014.

Under section 1014 of the statute of the United States, the judge of the district is invested with plenary power to grant or refuse the warrant of removal, and he is but exercising sound judicial discretion when he looks into the question of jurisdiction, and in looking into such question he may go behind the indictment.

6. SAME—HABEAS CORPUS.

By *habeas corpus* the jurisdiction of a court to try can be inquired into under

the law of the United States, by any judge or court which has a right to issue the writ.

7. CHEROKEE NATION—TITLE TO LANDS.

The Cherokee Nation of Indians hold what is called the "Cherokee Outlet" by substantially the same kind of title it holds its other lands. The title to all their lands was obtained by grant from the United States. This title is a base, qualified, or determinable fee, without the right of reversion, but only the possibility of reversion in the United States. This, in effect, puts all the estate in the Cherokee Nation.

8. SAME—ACT OF JANUARY 6, 1883.

Prior to the act of congress of January 6, 1883, the Cherokee Outlet was in the jurisdiction of the United States district court for the Western district of Arkansas. That act did not put it in the jurisdiction of the United States court of Kansas, as then and now it is Indian country, set apart and occupied by the Cherokees.

9. SAME—"OCCUPIED."

The word "occupied" or "occupation," may be used in law in connection with other expressions, or under the peculiar facts of the case, as to signify actual residence. Under the peculiar facts here, actual residence of the Cherokee Nation would be an impossibility.

10. SAME—POSSESSION.

When congress, in the act of January 6, 1883, used the word "occupied" it could have meant no more than the possession of the country. To have possession does not require actual residence.

11. SAME—LEGAL POSSESSION.

The word "occupy," as used in the act of congress above referred to means subject to the will and control, *possessio pedis*, and it is synonymous with "subjection" to the will and "control." Wherever there is a subjection of land to the will and control of another, with title in him, it is occupied by that other—it is in the actual legal possession of that other.

12. SAME—OCCUPATION BY NATION.

The usual legal sense of the word "occupy," as applied to land, is where a person exercises physical control over such land. Hence, when a nation or body of people have the title to land, and the same is subject to its will and control, it is occupied by it,—legally, it is in its possession.

On Application for Warrant of Removal and *Habeas Corpus*.

The petitioner for *habeas corpus* in this case was, on the eleventh of September, 1884, at a term of the United States district court of Kansas, begun and held at Wichita, indicted for the crime of arson, in the Indian Territory. Said indictment, in effect, alleges that the crime was committed in that part of the Indian Territory lying north of the Canadian river and east of Texas and the 100th meridian, not set apart and occupied by the Cherokees, Creeks, and Seminole Indian tribes; and that the same was committed within the exclusive jurisdiction of the United States district court for the district of Kansas. A certified copy of the indictment was sent to the marshal of the Western district of Arkansas, with the request that he obtain a warrant of removal, and bring petitioner before the district court of the United States for the district of Kansas, sitting at Wichita. The marshal of this district on the fifteenth day of December, 1884, applied to the judge of this court for a warrant for the arrest of the petitioner. The same was issued. The petitioner was, on the thirtieth of December, 1884, arrested on said warrant, and by the marshal of this district brought before the judge of this court, when the district at-

torney of this district applied to the judge for a warrant of removal; and simultaneous with such application the petitioner filed his petition for a writ of *habeas corpus*, in which he prayed that he might be discharged from arrest, for the reason that the alleged crime for which he is indicted, was not committed in that section of the Indian country over which the district court of Kansas has jurisdiction, but that the same, if any offense against the laws of the United States, was committed in that part of the Indian country lying north of the Canadian river, and west of Texas and the 100th meridian, set apart and occupied by the Cherokees, for which they hold a patent, which evidences their title, obtained from the United States. Said patent is dated December 31, 1838. In other words, that the court in which the indictment was found, had no jurisdiction over the place where the crime was committed, and consequently the indictment could not be lawfully found by the grand jury, and that the court would not have the right to try the same; that no trial can be lawfully had of the alleged crime in the district court of Kansas, and that, therefore, the petitioner cannot be lawfully removed to said district for trial; that consequently the warrant for his arrest should not have been issued by the judge of this court; and that now he is restrained of his liberty in violation of the constitution and laws of the United States. Other reasons are set up by the petitioner in his response to the return of the marshal to the writ of *habeas corpus*, but they not being necessary to a decision of the case, it is not deemed important to set them out.

Barnes & Mellette for petitioner.

W. H. H. Clayton, U. S. Dist. Atty., for the United States.

PARKER, J. This case is before me on the application of District Attorney Clayton for a warrant for the removal of petitioner to the district of Kansas, as well as upon the writ of *habeas corpus*, issued upon application of petitioner. Section 1014 of the Revised Statutes of the United States, among other things, provides that "for any crime or offense against the United States the offender may, by any justice or judge of the United States, * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

* * * And when any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had." If it be true that the district court of Kansas has no jurisdiction to try the offense alleged to have been committed by petitioner, this court had no right to issue the warrant for his arrest; and although said warrant is regular on its face, yet it would be without authority of law, as such warrant was issued solely with a view to his removal to the district court of Kansas sitting at Wichita. If that is not a court where a trial can be had for the alleged offense of arson, and

not the court which has cognizance of the offense, the petitioner cannot be held under this warrant.

The question presents itself under the statute of removal, how far the judge of the district can or may go in his inquiry into the case, before he takes action in the shape of ordering the removal of a person charged with crime in a district other than the one where he may be arrested. In *U. S. v. Brawner*, 7 FED. REP. 86, *In re James*, 18 FED. REP. 854, and *In re Buell*, 3 Dill. 116, it was, in effect, held that in acting on a motion for a "warrant of removal" the judge is performing a judicial function, and in the performance of such function, he may look into the proceedings of the commissioner, or the court in which the indictment was found, for the purpose of enabling him to properly determine questions pertaining to the removal, and grant or refuse the order accordingly. If the party has been indicted, can the judge go behind that indictment to inquire into the jurisdiction? The very question that he is called on to investigate and pass on in a proceeding for removal is where the offense is to be tried. What court has jurisdiction of it? Where the trial is to be had. Now, is he precluded from doing this by an indictment? The statute is very broad. He must inquire where the trial is to be had. He must send the party to the district where the offense is to be tried; to the court which has jurisdiction, where the trial is to be had. The judge of the district must judicially determine whether the prisoner shall be taken to another district for trial, and that he may refuse his warrant when it appears that the removal should not be made, or when he should admit the party to bail. The judge is to determine for himself whether the party charged should be held or removed. *U. S. v. Brawner*, 7 FED. REP. 86; Conkl. Treat. (4th Ed.) 582; *Murray*, U. S. Courts, 29; *Re Buell*, 3 Dill. 116, at p. 120; *U. S. v. Jacobi*, 14 Int. Rev. Rec. 45; *U. S. v. Pape*, 24 Int. Rev. Rec. 29; *U. S. v. Volz*, 14 Blatchf. 15; *U. S. v. Haskins*, 3 Sawy. 262; *Re Alexander*, 1 Low. 530; *U. S. v. Shepard*, 1 Abb. 431; *Re Doig*, 4 FED. REP. 193; and cases cited in these opinions.

In some of these cases there was a writ of *habeas corpus*, and in some, the original examination was before the district judge, and in one the question arose in the district to which the removal was made on motion to quash the indictment.

Judge HAMMOND, in *U. S. v. Brawner*, says:

"In none of these cases does it seem to have been treated as a matter of much importance by what form of procedure the action of the judge is invoked, and in none is it denied that he may determine for himself whether the removal is proper."

In the discretion of the judge he may take the indictment as *prima facie* evidence of jurisdiction; but suppose the party, when an application for removal is made, objects to the removal on the ground that the court to which he is sought to be removed, has no jurisdiction to try him, he certainly has the right to, in this way, raise the question

of jurisdiction. Jurisdiction can be raised at any stage of a criminal proceeding. It is never presumed, but must always be proved; and it is never waived by a defendant. If this principle be correct, it follows that the party who is charged with a crime, and arrested in one district to be removed for trial to another, can raise the question, as an objection to his removal, that he cannot be tried in that other, or that the trial cannot be had there for want of jurisdiction in the court either over the person, the subject-matter, or the place where the crime was committed. There is no question in my mind of the right of a person accused to raise the question of jurisdiction on the hearing of an application for removal, without invoking the aid of the writ of *habeas corpus*. *In re James*, 18 FED. REP. 853; *U. S. v. Brawner*, 7 FED. REP. 86. And when said question is raised it becomes the duty of the judge of the district to investigate the case so far at least as to ascertain if the court to which the accused is asked to be removed, is the one where the trial can be had. Under the statute the judge of the district is invested with plenary power to grant or refuse the warrant of removal, and he is but exercising sound judicial discretion when he looks into the question of jurisdiction. It must be remembered that this case is before me both on an application for removal of petitioner and on *habeas corpus*, and if there could be any question about the right of the judge to look to the question of jurisdiction on an application for a warrant of removal, there can be none as to his right to do so when the case is brought before him by *habeas corpus*. *In re Buell*, 3 DILL. 116; *U. S. v. Brawner*, 7 FED. REP. 86.

But it is objected by counsel that the case cannot be heard on *habeas corpus*, as the warrant for the arrest of Rogers was legal; that the officer held him legally by virtue of such writ, and he being in legal custody, he cannot be discharged by this writ at this stage of the case. If he had been arrested on a warrant of a commissioner, and committed to await a warrant of removal, the action of the commissioner could be inquired into by *habeas corpus*, or without it on the application for removal. *U. S. v. Brawner*, 7 FED. REP. 86; *In re Buell*, 3 DILL. 116. The petitioner is in the same condition when held by the marshal under the warrant issued by the judge of this district as though he had been committed by a commissioner to await a warrant of removal. The effect of the warrant was to commit him to the marshal to await the action of the judge in ordering his removal, as would be the effect of the action of a commissioner when he was committed by him to await a warrant of removal. In the one case, the judge, by *habeas corpus*, reviews the action of the commissioner. In the other he reviews his own action. By *habeas corpus* the jurisdiction of a court can be inquired into under the laws of the United States by any judge or court which has the right to issue the writ. *In re Buell*, 3 DILL. 16; *In re James*, 18 FED. REP. 853; *U. S. v. Brawner*, 7 FED. REP. 86.

In re Buell there was an indictment against Buell in the District of Columbia for libel, and he was arrested upon a warrant of a commissioner in the Eastern district of Missouri, where he sued out a writ of *habeas corpus* before Judge TREAT. He took up the question of jurisdiction, and discharged Buell on the ground that the indictment failed to show jurisdiction. This ruling was affirmed by Judge DILLON. If there is no jurisdiction to try, the party is held in custody contrary to the constitution and laws of the United States, and in that case this great writ of right, known as the writ of *habeas corpus*, can be invoked from any officer who has a right, under the laws of the United States, to issue it.

There can, I think, be no doubt that the petitioner can raise the question of jurisdiction on an application for removal either when the motion for a writ of removal is pending, and on such motion, or by *habeas corpus*, and that the judge can, if the question of the jurisdiction of the court to which the prisoner is asked to be sent for trial is raised, go behind the indictment to ascertain *where the trial is to be had*. Then the material question in this case is, did the district court of Kansas have jurisdiction of this alleged offense? The proof submitted in this case shows that a number of persons had banded together under the lead of one D. L. Payne, for the purpose of making a raid into the Indian country; that they had entered that country and made a settlement at a point four miles south of Hunniwell, Kansas, and the thirty-seventh parallel of north latitude, and between the ninety-seventh and ninety-eighth degrees of west longitude, a little north-west of the Nez Perce reservation on the Shaskaskie river; that these persons were intruders in the Indian country. They were there against and in violation of the laws of the United States. The president of the United States had issued his proclamation for their expulsion and arrest. The petitioner in this case had gone there as "acting Indian agent" of the five civilized tribes to point out to the military the intruders who were to be expelled and arrested. That the petitioner set fire to and caused to be burned a small board shanty, which the intruders could not, or would not, remove after being requested by petitioner to remove same. If this is an offense against the laws of the United States, it was committed in that part of the Cherokee country known as the "Cherokee Outlet." This country, together with the other part of its lands, was granted to the Cherokee Nation, as a nation, by the treaties between the Nation and the United States, made May 6, 1828. Indian Treaties 56 and 57, the fourteenth of February, 1833, Id. 63, and December 29, 1835, Id. 61. By these treaties the Cherokee Nation was granted a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary line of the 7,000,000 acres of land granted in and by the same treaties.

On the thirty-first of December, 1838, a patent was issued by the government of the United States, in accordance with treaty stipula-

tions for all its lands, including the outlet west. The language of the descriptive part of that patent touching the outlet is "that the United States further guaranty to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said 7,000,000 of acres as far west as the sovereignty of the United States and their right of soil extend." The "granting clause" is that the United States have "given, granted, and by these presents do give and grant, unto the Cherokee Nation the two tracts of land surveyed," which two tracts included the outlet. The *habendum* clause is "to have and to hold the same, together with all the rights, privileges, and appurtenances thereunto belonging, to the said Cherokee Nation," forever subject, however, "to the right of the United States to permit other tribes of red men to get salt on the Salt plain on the western prairie referred to in the second article of the the treaties of the twenty-ninth of December, 1836, which Salt plain has been ascertained to be within the limits prescribed for the outlet, and subject further to the condition provided by the act of congress, of the twenty-eighth of May, 1830," and which condition is that "the lands hereby granted, shall revert to the United States, if the Cherokee Nation become extinct or abandon the same." By looking at the title of the Cherokees to their lands, we find that they hold them all by substantially the same kind of title, the only difference being that the outlet is incumbered with the stipulation that the United States is to permit other tribes to get salt on the Salt plains. With this exception, the title of the Cherokee Nation to the outlet is just as fixed, certain, extensive, and perpetual as the title to any of their lands. This court held in the case of *U. S. v. Reese*, 5 Dill. 405, that "the Cherokees hold their land by title different from the Indian title, by occupation; they derived it by grant from the United States. It is a base, qualified, or determinable fee without the right of reversion, but only a possibility of reversion, in the United States. This in effect puts all the estate in the Cherokee Nation."

Prior to the act of congress of January 6, 1883, all of the country lying west of Missouri and Arkansas, known as the "Indian Territory," was attached by a law of the United States to the judicial district of Arkansas. And the district court of such district had jurisdiction over all the country described above as Indian country for the trial of offenses, when committed by a certain class of persons, or upon a certain class of persons. Up to the time of the act above referred to there was no question as to the Cherokee outlet being in the jurisdiction of the district court for the Western district of Arkansas. It was Indian country and Indian country, lying west of Missouri and Arkansas, and a part of what was known as *the Indian country*. On the date above named, congress passed an act entitled "An act to provide for holding a term of the district court of the United States, at Wichita, Kansas, and for other purposes, which provides, by section 2, "that all that part of the Indian Territory lying north of the Can-

adian river and east of Texas and the 100th meridian, *not set apart and occupied* by the Cherokee, Creek, and Seminole Indian tribes, shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial district of Kansas, and the United States courts at Wichita and Fort Scott, in the district of Kansas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said district of Kansas against any of the laws of the United States now or that may hereafter be operative therein." 22 St. 400.

By the treaties and patent above referred to the Cherokee outlet was, beyond question, *set apart* to the Cherokees and to that extent was in a condition the converse of that which is necessary to attach it to the district of Kansas. It matters not what may have been the extent of their title. If they had a title of any degree whatever, it was set apart to them. Now, at the time of the commission of this alleged offense, was it occupied by the Cherokee tribe of Indians? If it was set apart and occupied by this tribe, it is not in the jurisdiction of the district court of Kansas.

The evidence in this case shows that the Cherokee Nation has constantly, and all the time since it obtained the outlet, claimed it, and exercised acts of ownership and control over it. The nation has collected at different times a grazier's tax from white men who were grazing their stock on it. Individual Indians have gone on it and fenced up large tracts of land on the outlet. Different individual Indians have gone out and lived on it, and now live on it. That since the passage of this law of January 6, 1883, the Cherokee Nation has leased to citizens of the United States for grazing purposes 6,000,000 acres of this outlet. That under the provisions of the sixteenth article of the treaty of 1866 with the United States, it has sold tracts of land on this outlet for reservations to the Pawnees, Poncas, Nez Perces, Otoes, and Missouras. The very country where this alleged offense was committed, was, at the time of its commission, leased to the cattle men as a part of the 6,000,000-acre lease. That the Cherokee Nation never has abandoned any part of the outlet except what it has sold. It claims the title and possession of the outlet and of that part of it where this alleged offense is shown to have been committed. The United States, the grantor, has admitted its title to it. Then, does the Cherokee Nation occupy the country where the offense was committed? It becomes necessary in this connection to ascertain what is meant by the word "occupy." It is well to remember that the country was set apart to the Cherokee Nation,—not to individual Cherokees, but to the Cherokee Nation as such. When congress used the phrase "not set apart and occupied," did it mean to imply that to constitute an occupation the Cherokee Nation must actually reside on the land, as a tenant resides in the house of his landlord? How could the nation do that? This would be impossible. Did it mean to say that all the country upon which individual Indians, members

of the tribe, did not actually reside, was after the passage of the act to be in the jurisdiction of the district court of Kansas? If so, the jurisdiction of that court would be of the most rambling, meandering, and uncertain character; as it is a notorious fact that there are millions of acres scattered all over the Cherokee Nation, which are not occupied either by the nation or its citizens in the sense of actual residence upon the land. We find that the word "occupied" or "occupation," may be so used in law, in connection with other expressions, or under the peculiar facts of the case, as to signify actual residence. Under the peculiar facts here, actual residence of the Cherokee Nation would be an impossibility and an absurdity. When congress used the word "occupied," it could have meant no more than possession of the country. To have possession does not require actual residence. Words are to be taken according to their customary legal meaning. We find that, ordinarily, in the law, the words "occupation," or "occupy," or "occupied," mean, as used, subject to the will and control *possessio pedis*; that the words "occupation," or "occupy," or "occupied," are synonymous with subjection to the will and control. Wherever there is a subjection of land to the will and control of another with title in him, it is occupied by that other. It is in the actual legal possession of that other. *Lawrence v. Fulton*, 19 Cal. 690; *Plume v. Seward*, 4 Cal. 94; *Bailey v. Irby*, 2 Nott & McC. (S. C.) 343; *Jackson v. Woodruff*, 1 Cow. 285; *Jackson v. Halstead*, 5 Cow. 219. Messrs. Rapalje & Lawrence, in their Law Dict. vol. 2, p. 893, in defining the word "occupation," say, "In its usual sense, it is where a person exercises physical control over land." Hence, when a nation or body of people have the title to land, and the same is subject to their will and control, it is occupied by them, —legally, it is in their possession.

The government of the United States occupies all of its public lands. The Cherokee Nation occupies, and is in the actual legal possession of, all its lands to which it has title, and to which it has not relinquished such title. This, in my judgment, is the only reasonable interpretation which can be given to this word "occupied," as used in the act of congress of January 6, 1883. If this be so, there is left no room for any other construction of this act of congress than that it does not put in the jurisdiction of the district court of Kansas any of the Cherokee country to which the nation has title, and which is subject to its will and control. But it is claimed in this case that the Cherokees no longer have any title to the country where the alleged offense is said to have occurred, as they sold it to the Cheyennes and Arapahoes in 1866.

We find by the treaty of May 22, 1866, between the United States and the Cheyennes and Arapahoes, a reservation was set apart for them, which included, as a part thereof, the very country where this alleged crime was committed. By the terms of the second article of the treaty they were not required to settle on said reservation until

such time as the United States shall have extinguished all claims of title thereto on the part of other Indians to said reservation. They did not settle on this reservation, and claimed that they did not understand the location of it as defined by the treaty with them of August 16, 1868, and therefore refused to go upon it. The president of the United States, by executive order of August 10, 1869, located them on their present reservation on the North Fork of the Canadian river. By the sixteenth article of the treaty of July 27, 1866, between the United States and the Cherokees, it was agreed "that the United States may settle friendly Indians in any part of the Cherokee country west of 96 deg., to be taken in compact form, in quantity not exceeding 160 acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee-simple to each of said tribes, to be held in common, or by their members in severalty, as the United States may decide; said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the president, and if they should not agree, then the price to be fixed by the president; the Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96 deg. of longitude, until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied. The plain meaning of this provision of the treaty is that when the United States should desire any of the outlet for the settlement of friendly Indians on the same, that the Cherokees would sell the same to such Indians, and make title in fee-simple to them for the same,—the purchase price to be paid by them, or the government of the United States for them, to the Cherokees. But until the country, or any part of it, is *so sold and occupied*, the right of possession and jurisdiction over all of said country west of 96 deg. of longitude to be retained by the Cherokees. Here is a plain recognition of the title of the Cherokees by the government of the United States, with their right of possession and jurisdiction. Inasmuch as there never was any sale by the Cherokees to the Cheyennes and Arapahoes of the country where this offense was committed, that the same was never sold by them and occupied by the Cheyennes and Arapahoes, the country is still in the condition of being set apart and occupied by the Cherokees, and does not come under the designation of *Indian country not set apart and occupied by the Cherokees*. Therefore, it is not in the jurisdiction of the United States district court for the district of Kansas, and that court is not one in which a trial of the case of Rogers can be had, and the "petitioner" cannot be removed to said district, and the "warrant of removal" will be refused, and the petitioner in the proceeding by *habeas corpus* will be discharged.

UNITED STATES *v.* GUNNING and another.*(Circuit Court, S. D. New York. May 8, 1885.)*

PATENTS FOR INVENTIONS—PATENT OBTAINED BY FRAUD—MOTION TO REOPEN CASE.

Motion to reopen case for further proof denied, and former opinion (22 FED. REP. 653) adhered to.

In Equity.

Andrew J. Todd, for defendant Ingersoll.

G. E. P. Howard, for plaintiff.

WHEELER, J. This cause has now been heard upon the motion of the defendant Ingersoll, made since the hearing in chief, (22 FED. REP. 653,) to reopen the case for further proof. The testimony sought to be had is that of the defendant Gunning, as to making the invention, and that of one Barnes, in corroboration. The patent is No. 265,051, dated September 26, 1882, and is for letters and figures of enamel, baked on copper or other metal, for signs on windows, and in other places. The testimony proposed is in substance that, seeing enameled articles, he conceived the idea of making letters and figures of the same material in the same way before any one else; and suggested it to others, who acted upon the suggestion, and made such letters, but not that he ever made any such letters or figures. The principal testimony is his own, and there is none shown to be had that he did not know of, nor that the defendant Ingersoll is shown not to have been aware of before the hearing. The principal ground for the motion is that she was not able to take his testimony after the plaintiff's testimony was closed. He and Barnes were both witnesses for the plaintiff, but not to the making of the invention. It does not appear that he was so far distant that she could not easily take his testimony if she had known where he was; nor that she made any arrangement with him, or undertook to, when she was in communication with him, for taking his testimony, or for keeping informed of his whereabouts. Affidavits are made that she diligently endeavored to find him, when she got ready to take testimony, but what efforts she made are not set out. On the whole, it appears that she lost this testimony rather from her own lack of diligence than from any other cause. She shows no right to have the case opened according to the usual practice in such cases; and her motion can be granted only by the exercise of large discretion in her favor.

As this is a bill to repeal the patent for fault in its procurement, the existence of the fraud, and not the validity of the patent otherwise, is the main thing in controversy. But upon the question whether discretion should be exercised to give unusual relief, it is proper to look into the nature of the patented invention far enough to ascertain

whether any useful result is likely to follow from its exercise. Gunning does not pretend that he invented enameling on metal, and of course not that he invented signs, or letters for signs. The materials and mode of manufacture were all old. The most that he did, according to his own story, as now told, was to conceive the idea of making letters out of old materials in an old way. There was nothing new but the purpose. This would not appear to be any patentable invention. *Pennsylvania R. Co. v. Locomotive Safety Truck Co.* 110 U. S. 490; S. C. 4 Sup. Ct. Rep. 220.

It does not appear that the patent could be saved from this suit for any good purpose, even if the proposed testimony would save it. Gunning might prefer that the patent should fail from other grounds than his fraud, but he is not asking for anything in this behalf. No costs were allowed against the defendant Ingersoll, and none would be taxable in her favor against the government if she should prevail in this case, and no fraud is proved against her; therefore it can make no difference to her whether the patent fails here or not, unless she wishes to hold it for some improper purpose, which is not to be presumed. Besides this, there is the fact which appears in the case, and which the proposed testimony does not meet, that the patented letters, made by others, were sold by Gunning more than two years prior to his application, which would invalidate the patent, although his affidavit that the invention had not been in public use or on sale for two years prior to the application, which accompanied the application, may not have been made with such fraudulent intent as to warrant a decree setting aside the patent.

Motion denied.

THE ANCHORIA.

(*District Court, S. D. New York. March 29, 1885.*)

ADMIRALTY PRACTICE—EXCEPTIONS—FINAL HEARING—COSTS.

The hearing of exceptions to a pleading in admiralty, where the exceptions are in the nature of a special demurrer, or a motion to make more definite and certain, is not such a "final hearing in equity or admiralty," under section 824 of the Revised Statutes, as to entitle a party to a docket fee or costs.

In Admiralty.

Scudder & Carter and Geo. A. Black, for libelants.

Hill, Wing & Shoudy, for the Anchoria.

BROWN, J. The libelants having excepted to the answer for want of sufficiency, fullness, and distinctness, the exceptions were sustained, and the defendant was directed, as provided by rule 28 in admiralty, to answer more fully. On the settlement of the order the libelants claimed costs of the hearing upon the exceptions. Rule 28, promul-

gated in 1844, authorized the court to require the defendant "to pay such costs as the court shall adjudge reasonable." The subsequent fee bill of 1853, as modified by section 823 of the Revised Statutes, provides, however, that "the following and no other compensation shall be taxed to attorneys," etc., "except in cases otherwise expressly provided by law." Among the fees made taxable by the following sections there are no costs provided for the hearing of a motion merely. The only language applicable is the provision for a docket fee "on a final hearing in equity or admiralty," under section 824. In the case of *Wooster v. Handy*, 23 FED. REP. 49, Mr. Justice BLATCHFORD has recently carefully considered what constitutes a final hearing sufficient to entitle the party to tax a docket fee. In conclusion, it is said that "there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in his bill or libel as the ground for the permanent relief, which his pleading seeks, on such proofs as the parties place before the court,—be the case one of *pro confesso*, or bill, or libel and answer, or pleadings alone, or pleadings and proofs."

From this it is clear that unless the hearing be one upon which it is competent for the court to make either a final or an interlocutory decree binding the parties upon the merits, it is not such a "final hearing" as authorizes an allowance of costs; but where the hearing is of that character, such a fee may be awarded. This is in accordance with what, since 1853, has been the practice of this court upon the hearing of exceptions to a libel or an answer. Where the exceptions go to the whole cause of action, or to the sufficiency of the libel or answer, and are such as in common law pleading would be equivalent to a general demurrer, the practice has been to allow a docket fee to the successful party. Such a hearing is in effect a final hearing upon the cause presented by the pleadings and exceptions. In such cases it is discretionary with the court whether it will permit any amendment or not; and if none is permitted, a final decree would follow. The fact that the court may permit further pleading on the payment of the costs, does not make the previous hearing any less a final one as respects the cause of action already heard before the court. This rule was applied by Judge BETTS upon exceptions to a libel involving the merits in the case of *Whitlock v. The Thales*, February term, 1859, in which the exceptions were overruled and a docket fee was allowed to the libellant, and the defendant was permitted to answer. It was applied by BENEDICT, J., in the case of *Aumach v. S. S. Creole*, November 24, 1865, upon exceptions to the libel for insufficiency, where the exceptions were sustained, and a decree ordered for the claimant, with liberty to the libellant to file an amended libel on payment of costs.

The exceptions in this case are not to the merits, or to the general

sufficiency of the libel; but are in the nature of a special demurrer, or of a motion to make the pleadings more definite and certain. Upon exceptions of this limited character, rule 28, before referred to, directs what order the court shall make; namely, to require the defendant "forthwith to answer the same." As this rule is a specific direction to the court, I think the court would not be fairly authorized or warranted, under the more general provisions of rules 30 and 32, to proceed *pro confesso* against the defendant in the first instance for default of "due answer." But should a default be afterwards entered for the defendant's contumacy in not obeying an order entered under rule 28, there is no doubt a docket fee could then be taxed. *Wooster v. Handy, supra*; *Hayford v. Griffith*, 3 Blatchf. 79; *The Bay City*, 3 FED. REP. 48; *In re Trundy*, 18 FED. REP. 607.

A hearing on exceptions like the present is, therefore, in no sense a final hearing; and the practice which has previously obtained, in not awarding costs on such hearings, must be adhered to.

THE NELLIE FLAGG.

(District Court, N. D. New York. May 12, 1885.)

TOWAGE—NEGLIGENCE—INJURY TO CANAL-BOAT IN LOCK.

On examination of the evidence in this case, *held*, that negligence on the part of the steam-tug Nellie Flagg, causing the injury to the canal-boat William A. Rundell, was not shown, and that the libel should be dismissed.

In Admiralty.

J. F. Mosher, for libellant.

E. W. Douglas and *E. L. Fursman*, for claimant.

COXE, J. The libellant, Charles P. Moore, as master of the canal-boat William A. Rundell, contends that on the eighteenth day of November, 1882, at West Troy, New York, while his boat was being towed by the steam-tug Nellie Flagg, she was injured by the careless and unskillful navigation of the tug, in running her against the center pier, which divides the locks between the Hudson river and the State Basin at that point. Through one of these locks it was necessary for the canal-boat to pass in order to reach her destination. The claimant insists, *inter alia*, that the injury was caused, after the tug had cast the canal-boat loose, by the negligence of the libellant in permitting her to strike, stem on, against the bucking-beam of the lock. The evidence sufficiently establishes the following propositions:

First. While the canal-boat was in charge of the tug, her lowest guard, at the corner of the port-bow, came in contact with the north-west corner of the pier. *Second.* After the tug had left her she struck the bucking-beam of the lock, stem on. This the libellant admits. *Third.* The leak was not discovered until she was in the lock. *Fourth.* After being put on the dry-dock, it was

found that there was an opening on the port-bow from 18 inches to 2 feet below the lowest guard, at the upper edge of the corner-streak, on the turn coming up to the side from the bottom of the boat. The seam, for a distance of from four to five feet, had opened sufficiently to permit the oakum to be drawn out and cause the leak.

Even if it be assumed that the blows were equally severe, how can the court determine, upon this proof, which of the two opened the seam? Upon what theory can it be said that this was done prior to the entry into the lock? And yet, remembering that the burden is upon the libelant, it is incumbent upon him to satisfy the court, by evidence having greater weight than that offered by the claimant, that the blow at the pier occasioned the damage of which he complains.

It is thought that there is no way of ascertaining, with any degree of certainty, that the tug caused the injury. To say that she did so would be to substitute inference for proof. The strongest statement permissible from the evidence is that she might have done so. But speculation and conjecture have no place in an investigation of this character. If, then, the proof were equally balanced between the two theories, it is quite clear that the libelant could not recover.

The claimant has, however, established, by a preponderance of evidence, that the injury was inflicted in the lock. The only expert witness called—the boat-builder who repaired the canal-boat—was clearly of the opinion that the opening of the seam was caused by a blow on the stem, and that it was improbable, if not impossible, that it could be caused by a blow of the character described by the libelant.

The evidence is conflicting as to the manner in which the tug landed the boat at the pier. That there was nothing unusual about it is maintained by a majority of the witnesses. Even if she struck the pier with more than ordinary force, there can be little doubt that the blow was a glancing one, and that the first seam above the corner-streak, where the leak occurred, was nearly two feet below the point of contact, and could not possibly have come in direct collision with the pier. Add to this the fact that, on the testimony, the collision at the bucking-beam was the severer of the two, and that after it occurred the leak was first discovered, although the blow at the pier was given some 20 minutes before, and the presumptions point with great clearness to the claimant's contention that the negligence which caused the injury must be imputed to the libelant.

It follows that the libel must be dismissed, with costs.

CENTRAL TRUST CO. v. TEXAS & ST. L. RY. CO., CAMDEN LUMBER CO.,
and others, Intervenor.¹

(Circuit Court, E. D. Missouri. April 29, 1885.)

1. LIENS FOR RAILWAY SUPPLIES—OPEN ACCOUNT.

Under the Missouri statutes a material-man is entitled to a lien for the whole amount due him for materials furnished a railroad under an open and current account, if the last item of the account accrued subsequently to the time within which a lien could be filed.

2. SAME—EQUITABLE LIENS—MORTGAGES.

Where a material-man is entitled to a statutory lien against a railroad in the hands of a receiver, this court will treat his claim as if all necessary steps had been taken under the statute, and will allow him an equitable lien prior in right to that of mortgage creditors.

Exceptions to Master's Report.

The intervenors' claim in this case is for lumber furnished from time to time, between August 20, 1883, and December 3, 1883. Default in the payment of interest took place September 1, 1883, and a receiver was appointed January 12, 1884.

L. P. Nolan, for intervenors.

Butler, Hubbard & Stillman, Phillip & Stewart, and Eleneious Smith, for complainant.

Wells H. Blodgett and Eleneious Smith, for receiver.

BREWER, J., (orally.) In the intervening petitions in the Texas & St. Louis Railway Company, which have been held by us for some time because of the decision of the supreme court of this state as to the construction of the lien law, the conclusion to which we have come is that the master has rightly interpreted that lien law, and that his exposition of the order heretofore made by this court, in reference to subsisting contracts, is also correct. Were it not for the fact that the materials furnished went into the permanent structure of the road, and for which a lien could be obtained, we think that the claims would have to be disallowed as far as the items of account furnished prior to the first of September are concerned. But there was an "open, running account," as the supreme court construe that term. Indeed, in reference to one of these cases, the parties agreed that there was an open, running account; and while the essential facts, as narrated by the master, do not seem to me to fully bring it within the description of an "open, running account," yet there is an express stipulation of the parties. The other case presents substantially the same facts; and if there was an open, running account, the last items of which accrued subsequently to the time within which a lien could be filed, the whole account should be sustained as a prior claim; for, as was stated very early in the proceedings in this case and formulated in an order, where parties are entitled to a lien, and can secure

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar

it by certain proceedings under the statutes of the state, they are not required to go to the expense of such proceedings, but this court will treat it as though all needful steps had been taken to establish the lien. In both these cases—one by express stipulation, and the other by a fair construction of the entire testimony—there were open, running accounts for material which passed into the permanent structure of the road. We think the parties were entitled to a lien, and therefore their entire claims should be allowed, and the exceptions to the report of the master will be overruled.

In reference to the particular order discussed by counsel, my brother TREAT has prepared an exposition which may help to a right understanding in future proceedings in this and other cases, which I will read:

“The various rulings of the court with respect to betterments and wages, not within the respective times stated,—to-wit, six months or otherwise,—have rested upon this distinct proposition: That supplies furnished or services performed under a *subsisting* contract, to which and to the continuance of which the parties were respectively bound, and the termination of said contract did not happen except within the time limited; or when such a continuing contract was still in force at the appointment of a receiver, the items of such continuing and subsisting contracts would fall within the prescribed rules. No other demands, independent in their nature, incurred before the prescribed time, are to be treated other than as credits at large. If this ruling is enforced there need be no difficulty with respect to what are called ‘open and current’ accounts. Such accounts must be under subsisting contracts, not to be terminated until within the period of time named; otherwise all items previous to that time must be rejected. This ruling may be subject to an exception where the local statute gives a lien under a different limitation. In the latter cases difficulties may arise if local decisions are followed, each one of which must depend on its special facts.’

That is, in order that there shall be a subsisting contract, it must be one binding on the vendor as well as upon the railroad. A mere open, running account does not necessarily come within the purview of that. In dealing with a grocery merchant, for instance, you order separately from day to day, and while, by implied understanding or express agreement, there may be an open, running account, yet it is an account terminable at the option of either party at any time. The purchaser may say he will make no further purchases. The merchant may decline to make further sales. It is not, therefore, a subsisting contract. There must be a contract by which the vendor is under obligation to furnish for a definite time; as for instance, if the vendor had contracted to furnish for a period of six months, so much lumber each month at a certain rate, there is a contract which during the six months is binding upon him as well as binding upon the road. It is a subsisting contract enforceable as against both parties. But where there is simply an open, running account, terminable at the instance of either party, at any time, it is not within the scope of the order. We think the master fairly interpreted it, and we sustain his construction.

CENTRAL TRUST Co. and another v. WABASH, ST. L. & P. RY. Co.
and others.¹

(Circuit Court, E. D. Missouri. May 1, 1885.)

RECEIVERSHIPS—ATTORNEY'S FEES.

Where, during the pendency of a receivership, counsel for the complainant present claims for professional services for allowance, they will not be allowed the full value of their services, but only a part thereof; and the balance will be allowed to stand until the litigation is disposed of, and the court can see whether or not the property in the receiver's hands will suffice to pay all expenses, and the court will then decide what final allowance should be made.

In the Matter of the Application of Messrs. Green, Burnett & Humphreys, for an allowance for professional services as attorneys for the petitioner in *Wabash & St. L. & P. Ry. Co. v. Central Trust Co.* and others.

Green, Burnett & Humphreys, pro se.

Wells H. Blodgett, H. S. Priest, and Geo. S. Grover, for receiver.

BREWER, J., (*orally.*) It is not because we think the counsel have not earned the amount reported by the master in their favor that we do not sustain this report in full; but we do not believe in the policy or propriety, pending a receivership, of making a large allowance to parties who are employed as officers of the court, or in looking after the interests of clients in that connection. They should wait until the matter comes to a close, and then their bills, as a whole, should be presented. The court can then look at them, and pass upon the question as to whether they are correct or not. It makes a great difference, practically, in the administration of affairs, whether parties present bills for two or three thousand dollars every three or four months, or at the end of the litigation for eight or ten thousand dollars. We do not mean that counsel shall go without compensation as the case progresses, because they cannot afford to; but still these intermediate allowances will always be small, and will not be in the way of a determination of what the services up to that time are really worth, or what they should be at the final disposition of the case. They will be simply in view of the necessities, so to speak, of counsel pending litigation; and while the master in this case recommends an allowance of \$6,000, the order will be that these gentlemen be paid \$2,000 on account. The matter will stand over until we come to the final disposition of the *Wabash Case*, and then all fees and claims will be presented, and it will be seen whether there are funds enough in the *Wabash* road to pay the expenses.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

WOOLDRIDGE and others v. IRVING and others.

VALLEY NAT. BANK OF ST. LOUIS v. KLEIN and others.

(Circuit Court, S. D. Mississippi. November Term, 1884.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—RESERVATION OF EXEMPT PROPERTY—PARTNERSHIP ASSIGNMENT.

Where an assignment by a firm in Mississippi excepts from the property conveyed such portion of it as is exempt by law from sale under execution, as provided by the laws of that state, without designating what property is claimed, and whether it is partnership property or individual property, the presumption will be that the exemption was intended to be out of the individual property of each partner, and the assignment will not be void.

2. SAME—ATTORNEY'S FEES.

A provision in an assignment that the assignee may, as part of the expenses of executing the trust, pay necessary attorney's fees, will not invalidate the assignment, unless such fees are to be paid for defeating an attachment.

3. SAME—PAYMENT OF FIRM DEBTS—PAYMENT OF PARTNER'S DEBTS.

That the assignment appropriates all of the assets belonging to the firm and to each individual member to the payment of the partnership debts, and, if any shall remain, then the remainder, whether arising from the partnership assets or that belonging to the individual members, to the payment of the individual debts of the assignors, will not render it void.

4. SAME—INTENT TO DEFRAUD CREDITORS.

On examination of the circumstances, as disclosed by the evidence in this case, *held*, that the assignment was intended to defraud creditors, and was fraudulent in fact.

5. SAME—POWER OF ASSIGNOR TO EXECUTE ASSIGNMENT.

It further appearing that the member of the banking firm who executed the assignment in this case had no authority to do so, *held*, that it was void *in toto*.

In Equity.

A. B. Pittman, for S. L. Wooldridge and others.

Catchings & Dabney, Buck & Clark, and H. C. McCabe, for Valley Nat. Bank.

Martin Marshall and Miller, Smith & Hirsh, for attaching creditors.

Shelton & Crutcher, Birchut & Gillaud, and Nugent & McWillie, for assignee and assignors.

HILL, J. These two causes are submitted together, upon bills, answers, exhibits, and proofs; the purpose of both suits being to have declared null and void, and canceled, an assignment and trust deed executed by said G. M. Klein, in his own name, and in the name of his father, said J. A. Klein, on the twenty-first day of November, 1883, upon the alleged grounds that said trust deed is—*First*, upon its face, fraudulent and void; and, *secondly*, that it was executed with the fraudulent purpose of hindering and delaying the creditors of said J. A. and G. M. Klein, as bankers and copartners, and as individuals. The answers deny the fraud charged, to which complainants have filed replications, and upon which a large volume of testimony has been taken and read upon the hearing, and will be referred to in considering the questions presented for decision.

The first question presented is as to whether or not the assignment, upon its face, contains any stipulations, which will, in law, render it fraudulent and void. This assignment is very lengthy, and was drawn by a lawyer, with unusual care, and in substance purposes to convey every species of property, rights, credits, and assets of every description, owned or possessed in any way by said J. A. and G. M. Klein, as bankers, doing business under the name and style of the "Mississippi Valley Bank," or otherwise, as partners, and of each of their individual property and assets of every description, wherever situated, to the defendant G. S. Irving, as trustee, who is by the assignment vested with the usual powers to sell the property and collect the assets of every kind; in a word, to reduce the entire property and assets into money, and, after the payment of the expenses of the trust, to first pay a very numerous class of preferred creditors, and then to pay those not preferred, if sufficient, and if not sufficient in either case, then to pay them ratably. The assignment provides that all the assets of the copartnership, and of its individual members, shall first be appropriated to the payment of the firm debts, and, if anything shall remain, then to apply the same to the payment of the individual claims against the said J. A. and G. M. Klein, whether arising from the firm assets, or those belonging to the individual members.

The clauses in the assignment which it is insisted render it void, are—*First*, that it excepts from the property conveyed such portion of it as is exempt by law from sale under execution, as provided by the laws of this state, without designating what property is claimed, and whether it is partnership or individual property. I have heretofore held that such a provision in an assignment of an insolvent debtor's property will render it void; and such has been the holding of the supreme court of Tennessee, and, since the decision made by me, of two or more courts of high authority; but as the supreme court of this state has held differently, I yield my own opinion to the better judgment of that court. Had the assignment excepted the exemptions out of the partnership property, I would hold it void; but it does not, and the presumption is that it was intended to be out of the individual property of each; therefore this objection is not well taken. The next objection is that it allows the assignee to pay, as part of the expenses of executing the trust, necessary attorney's fees. There is no objection to this, but I have held and still hold that in such assignments, if there is a provision to pay attorney's fees for defeating the attachment, it is an appropriation of the assets to pay the obligation of the assignor,—that being his suit alone,—and that such a provision will render the assignment void. But this assignment does not contain this provision, therefore this objection is not well taken. The third and last objection is that the assignment appropriates all of the assets belonging to the firm, and to each individual member, to the payment of the partnership debts, and, if any shall remain, then the remainder, whether arising from the partnership assets, or that be-

longing to the individual members, is to be applied to the payment of the individual debts of the assignors.

The assignment sets out with the declaration of the insolvency of the banking firm, but does not declare the insolvency of the members of the firm as individuals, apart from their individual liability for the debts arising by the firm. Had it provided that the firm assets should be applied to the payment of the individuals debts, without first satisfying the debts owing by the firm, I would hold the assignment fraudulent and void; but that is not the provision of this assignment. The provision is that after the partnership debts are satisfied, the residue, whether arising from partnership debts, or those belonging to the individual members, shall be applied to the payment of the debts against the individual members. If it is intended that the individual property of one member, or his share in the partnership assets, shall be, before the payment of his own debts, applied to the payment of the other, it would render the assignment fraudulent and void. This the assignee might do without violating the directions of the assignment, and is certainly a strong circumstance, taken in connection with other circumstances, tending to establish the fraudulent intent upon the part of G. M. Klein in making this conveyance; but I am not prepared to hold that it is sufficient to hold it void upon its face, therefore I cannot conclude that the conveyance contains, upon its face, sufficient provisions to render it fraudulent and void.

The next question is, was the assignment executed with the fraudulent purpose of hindering and delaying the creditors of the banking firm, or of either of its members? The proof shows that J. A. Klein, the senior partner of the firm, and father of G. M. Klein, had been in declining health for a number of years, and had for a year before the execution of the assignment become so imbecile of mind as not to be able to comprehend any business matters, and has since died without even knowing that his business had failed, or anything connected with it; and that the entire business of the firm and his individual business had been conducted by his son, said G. M. Klein,—so that if any fraud was committed it was done by G. M. Klein, who had a power of attorney, executed by his father before his mind became impaired, authorizing and empowering him to transact any business in his name, pertaining either to the business of the firm or of his private affairs; but no provision is made in it for making an assignment of the character of the one under consideration.

The proof also shows that G. M. Klein was engaged in quite a number of other business enterprises, of which he seems to have been a leading manager; that he had almost unlimited credit, and little or nothing was known of the embarrassed condition of the banking firm, or of any of the various enterprises in which G. M. Klein was engaged, until the day of his failure; that on the day before the assignment the bank received deposits amounting to over \$90,000; that on that day he had a deed conveying to his mother two valuable store-houses,

valued at \$24,000, (which from its date, and the date of the acknowledgment, was executed about a year previously, but never put upon the public record,) then placed upon record; that the rents had been collected and credited upon the books of the bank in the name of the firm, or of J. A. and G. M. Klein, and that nothing was known by others than the parties to it, and the officer who took the acknowledgment; that such a conveyance had been executed, and it is not known that the officer knew the contents of the deed. On the same day J. A. Klein's account was charged with \$20,000 for school warrants and other scrip; and also on the same day a credit for some \$2,000, standing on the books of the bank to the credit of M. C. Klein, of North Carolina, a brother of G. M. Klein, was by him transferred to the credit of his mother; and on the same day he sold a tract of land to his mother; and on the next morning before the assignment was made he delivered to his mother \$8,000 in warrants, etc. About 5 o'clock on the evening of the twentieth of November, he sent for his attorney, closed the doors of the bank, and all the employes in it went to work arranging for the assignment, which was completed, signed, and acknowledged before banking hours next morning. The defendant G. S. Irving was selected assignee. Mr. Irving was a customer of the bank, and was then indebted to it, and was a personal friend of the Messrs. Klein and family; the sureties upon his bond as assignee being the mother of Mr. Klein and other members of his family. When Klein applied to Irving to become his assignee, he remarked to him that he found that he could not meet paper then drawn upon him, and that he would make an assignment in which he would prefer his home creditors, and that he expected to arrange with the others, and rich creditors, on a basis of time. At the time of the assignment there was in the bank about \$6,000 in warrants, which had been obtained from one Wolf, and for which a due bill had been given and was held by Wolf. After the assignment Klein gave the warrants back to Wolf, and took up or canceled the due bill. Also, after the assignment, he delivered to the attorney of Mr. Peyton, of Raymond, a note for about \$5,000, belonging to his father; Peyton being a large creditor of the bank for deposits made, at interest, from time to time.

The mercantile firm of Ragan & Martin were large creditors of the bank; the last deposit by them having been made on the evening of the twentieth of November for a considerable sum. Ragan hearing of the failure of the bank became very much distressed, and importuned Klein to do something for him, in which he was aided by Mr. Andrews, a warm friend of Klein. Shortly afterwards Ragan & Martin were paid in money and warrants several thousand dollars, which Klein in his testimony stated that he obtained from his mother. He also testifies that since the failure he has paid to the destitute and needy home creditors some \$15,000, which he also obtained from his mother. After the assignment was made, Klein made an assignment of an interest he had in certain railroad enterprises, upon which he placed a

high estimate, to Thomas Rigby, who held a large indebtedness against the bank. This assignment was antedated so as to show that it was made before the assignment to Irving, and was witnessed by his confidential friend.

The proof shows various other transactions made by G. M. Klein before and soon after the assignment to Irving, which need not be referred to in detail, which require explanation to establish their good faith. As soon as the failure was known to the citizens of Vicksburg, a very large number of all classes of whom were creditors of the bank, and of the Klein's individually, quite an excitement among them was created, and a committee was appointed to interview Klein, and to try to get him to do something for their relief. Of this committee Mr. A. Kuhn was chairman, or an active member, and he made an earnest application to Klein to do something for them. At the time of this interview Gen. Butts had been appointed receiver, and had possession of the assets. Klein was pressed to give a statement of the cause of the failure, and to give a statement of the assets of the bank and partners, which he promised to do, provided Butts, whom he considered as his enemy, was removed from the receivership, but that unless that was done he would make no disclosure of the assets and business; that in speaking of the matter he pointed to the sides of the house, and remarked that there were securities all around this house that no one knew anything about but himself, and would not, unless Butts was removed as receiver. Butts soon after resigned as receiver, but the statement has not been furnished his successor. Klein in his deposition explains that he meant that the securities were in the hands of banks and others, as collateral security for liabilities to them; but there is no proof that he has ever made a statement of them to the receiver, or discovered them in any way. Klein in his deposition endeavors to explain a number of the transactions stated, but the circumstances were certainly such as to cast a strong suspicion upon their fairness, and ought to be explained by all the proof within the control of the defendants sustaining the explanations attempted to be given by Klein, which has not been done; and the presumption is that the proof could not be had.

The proof further is that the liabilities, as shown by the books of the bank, are in all \$1,147,908.32, and the nominal assets of all kinds, belonging either to the firm or the individual members, amount to about \$400,000, out of which may be realized \$200,000. For a considerable portion of the difference between the liabilities and the assets there is no satisfactory explanation; there may be a satisfactory reason, but it ought to be given.

The sole question is, do these circumstances, considered separately, or all taken together, establish a fraudulent purpose in G. M. Klein, in making this deed of assignment; or, if not, are its provisions such that the assignee cannot execute the trust imposed? These conveyances, like all others, are presumed to be executed with an honest

purpose, and this presumption stands until overcome by the proof. It is said that courts should be astute in finding reasons to sustain them; I suppose the meaning is that courts should be astute in ascertaining the truth. Mr. Klein, in his testimony, says he did not know of his embarrassed condition until the twentieth day of November,—the day before the assignment was made,—and that he did not then contemplate making the assignment until about 5 o'clock in the evening. It was his duty to have known his pecuniary condition long before that time, and it is passing strange that he did not do so. Whether he contemplated making the assignment before the time stated by him or not, the arrangements made on that day to secure his family, by placing the deed to the town lots and improvements thereon on record, and the other provisions for his family, go far to establish the fact that some steps were to be taken without delay, or they would suffer loss. There is no reason given why these steps were not taken before that time.

The secrecy which was observed in preparing and executing the assignment is another circumstance going to show the purpose of the transfer. That G. M. Klein had no power to execute the assignment in the name of his father, and that, so far as that part of the assignment is concerned, it was not binding on him in his life-time, or those claiming after him, and is not binding on his individual creditors, is apparent—*First*, for want of power in the power of attorney; and, *secondly*, because the power of attorney was revoked by the insanity of J. A. Klein, the maker, and which insanity was well known to G. M. Klein when he executed the assignment, and which had been carefully concealed by him from the business public. The effect of this want of power to execute the assignment, if there was nothing more, in my opinion, renders the conveyance void, as it will be impossible for the assignee to execute the trust imposed in all such instruments, the conveyance itself being the only guide for the assignee. The establishment of this want of power is necessarily done by proof outside of the face of the assignment, and could not be considered when determining its validity or invalidity upon its face. And if the conveyance were not invalid for this reason, I am satisfied that, considering the occurrences upon the day before the assignment was executed, on that day, and on the subsequent days, as shown by the evidence, it cannot be maintained that the conveyance was made with the sole purpose of having all the property and assets, purported to be conveyed honestly and fairly, applied to the payment of the debts due by the firm and its members. This position is greatly strengthened by the fact that no statement has ever been made of the collaterals claimed to be held by distant creditors, the refusal to disclose which only upon condition of Butts' removal was not consistent with good faith to his creditors; and, had it been so, the failure to disclose them to his successor is unexplained. Therefore, for the reasons stated, I am brought to the conclusion—*First*, that the assignment is fraudu-

lent in fact; and, *secondly*, that it is void as to J. A. Klein, and is incapable of execution, and therefore void *in toto*.

A decree will be entered in each cause declaring the assignment null and void, and for its cancellation.

HOW EXECUTED. Under the New York law a general assignment should be executed and acknowledged by all the members of the firm the same as a deed of real estate, otherwise it is void and inoperative.¹ Where an assignment is made in another state, if valid there, is valid here.² A partner who has withdrawn from the firm need not join in the assignment by the firm.³

DISSOLUTION OF PARTNERSHIP. If partners dissolve the partnership in good faith, and divide the partnership assets among themselves,⁴ or transfer them all to one partner,⁵ after such transfer a partner may use the assets to pay his individual debts, without being a violation of the rights of partnership creditors.⁶ A dissolution and division of assets among partners is not in itself fraudulent, although the object is to prevent individual creditors of one partner from levying on partnership property;⁷ but if the effect is to delay, hinder, or defraud individual creditors of one partner, it is void.⁸ If a dissolution is not made in good faith, but to divert partnership assets from partnership creditors to individual creditors, it is fraudulent, and partnership creditors are entitled to priority out of the assets,⁹ even though the transfer was to pay individual debts.¹⁰ In such case the insolvency of the partnership may be considered, in determining whether the dissolution was in good faith or not.¹¹ On dissolution of the partnership, the firm creditors have the right to have partnership property applied to the payment of the partnership debts in preference to those of the individual partner;¹² and this right cannot be impaired by any consideration with reference to the amount of capital contributed by each individual partner;¹³ and debts contracted in the name of one partner may be shown to be in reality partnership debts;¹⁴ but where such debt was incurred by consent or privity of the other partner, proof of joint creditors against the separate estate, in competition with the separate credit-

¹In re Lawrence, 5 Fed. Rep. 349; Smith v. Tim, 14 Abb. N. C. 447.

²In re Paige & S. L. Co. 31 Minn. 136; S. C. 16 N. W. Rep. 700.

³First Nat. Bank v. Hinman, 21 N. W. Rep. 280; Same v. Rock River Paper Co. Id. 280.

⁴Case v. Beauregard, 99 U. S. 119; Allen v. Center Valley Co. 21 Conn. 130; Kimball v. Thompson, 54 Mass. 283.

⁵Ladd v. Griswold, 9 Ill. 25; Howe v. Lawrence, 63 Mass. 553; Robb v. Mudge, 80 Mass. 534; Shirner v. Huber, 19 N. B. R. 414; McNutt v. Strayhorn, 39 Pa. St. 269; Smith v. Edwards, 7 Humph. 106.

⁶Case v. Beauregard, 99 U. S. 119; Hapgood v. Cornwell, 48 Ill. 68; Goebel v. Arnett, 100 Ill. 34; Armstrong v. Fahnestock, 19 Md. 58; Pfromm v. Koch, 1 N. Y. 460; Sage v. Chollar, 21 Barb. 596; Dimon v. Hazard, 32 N. Y. 65; Wilcox v. Kellogg, 11 Ohio, 394; Baker's Appeal, 21 Pa. St. 76; Bullitt v. Chartered Fund, 26 Pa. St. 108.

⁷Atkins v. Saxton, 77 N. Y. 195.

⁸Burrill v. Lawry, 18 N. B. R. 367; Weaver v. Ashcroft, 50 Tex. 427.

⁹In re Cook, 3 Biss. 122; Collins v. Hood, 4 McLean, 186; In re Byrne, 1 N. B. R. 464; In re Tomes, 19 N. B. R. 36.

¹⁰Tracy v. Walker, 1 Flippin, 41; Collins v. Hood, 4 McLean, 186; Sanderson v. Stockdale, 11 Md. 563; Flack v. Charron, 29 Md. 311; Phelps v. McNeely, 66 Mo. 554; Ferson v. Monroe, 21 N. H. 462.

¹¹Frank v. Peters, 9 Ind. 344; Shemer v. Huber, 19 N. B. R. 414.

¹²Case v. Beauregard, 99 U. S. 119; Evans v. Winston, 74 Ala. 349; Warren v. Taylor, 60 Ala. 218.

¹³Wilson v. Robertson, 21 N. Y. 587.

¹⁴Cox v. Platt, 32 Barb. 126; Read v. Baylies, 35 Mass. 497; Marks v. Hill, 15 Grat. 400; Barcroft v. Snodgrass, 1 Cold. 430; Siegel v. Chidsey, 28 Pa. St. 279; Gwin v. Sedley, 5 Ohio St. 96; Haben v. Henshaw, 49 Wis. 379; Schaeffer v. Fithian, 17 Ind. 463; Wait v. Bull's Head Bank, 19 N. B. R. 500.

ors, will not be admitted.¹ An assignment by one partner of a firm operates as a dissolution of the partnership.²

VALIDITY OF PARTNERSHIP ASSIGNMENT. Where a voluntary assignment of partnership property was made in trust for the payment of all partnership debts that should be proved "as provided by statute," and afterwards for the payment of individual debts, it contains no unlawful preference.³ If property is purchased in the firm name with assets of a prior firm, a transfer of part or all of it, to secure a creditor of the prior firm, is valid.⁴ A debtor may prefer creditors if he make no reservation for his own benefit to the injury of creditors unprovided for.⁵ At common law an insolvent may make an assignment in trust for the benefit of his creditors, and may give a preference to *bona fide* creditors.⁶ If the sole purpose of the maker be to discharge an honest debt, the deed is not fraudulent.⁷ A deed which gives a preference to his sureties to prevent one creditor from obtaining full satisfaction to the injury of other creditors is not fraudulent.⁸ An insolvent debtor, making an assignment of all his property, may devote his individual property primarily to the payment of his individual debts.⁹ A sale by one partner of an insolvent partnership of his individual property, to secure an antecedent personal debt, is not fraudulent;¹⁰ and an assignment made after execution of an assignment of the firm property is not void because there is no provision for payment of debts fully provided for in the firm assignment;¹¹ but a preference of individual debts of a partner in an assignment by the firm is void.¹² A transfer of separate property, in consideration of a debt due by the firm, is founded on a good consideration.¹³ A deed may be valid as to *bona fide* debts and void as to fraudulent and fictitious debts.¹⁴ The validity of an assignment is to be determined by the intent of the assignor, and his contemporaneous fraudulent acts are evidence of such intent.¹⁵ A debtor may pay or secure a creditor or number of creditors where no statute forbids it.¹⁶ An assignment, which does not purport to pass the title owned by the partnership making it as well as the individual property not exempt from forced sale, and owned by the individuals of the firm, cannot be sustained.¹⁷

ASSIGNMENT BY ONE PARTNER. If the partnership is dissolved in good faith, and one partner takes the property and assumes the firm debts, he may subsequently assign the same for payment of his individual debts,¹⁸ or the debts due creditors of any new firm of which he may become a member.¹⁹ The surviving partner of an insolvent firm may make an equitable and just assignment of partnership effects for the equal benefit of all the firm creditors; but as trustee he is not permitted to assign and give a preference to certain creditors.²⁰ One of two partners, with consent of the other, may make an as-

¹ In re Lloyd, 22 Fed. Rep. 91; In re McEwen, 12 N. B. R. 11; In re McLean, 15 N. B. R. 333; In re May, 19 N. B. R. 101.

² Conrad v. Buck, 21 West Va. 396.

³ Bradley v. Kroft, 19 Fed. Rep. 295.

⁴ Day v. Wetherby, 29 Wis. 363.

⁵ Guggenheimer v. Brookfield, 90 N. C. 232.

⁶ Means v. Montgomery, 23 Fed. Rep. 421.

⁷ Moore v. Hinnant, 89 N. C. 455; Haffner v. Irwin, 1 Ired. Law, 490.

⁸ Means v. Montgomery, 23 Fed. Rep. 421; Reed v. McIntyre, 98 U. S. 511.

⁹ Evans v. Winston, 74 Ala. 349; Bank of Mobile v. Dunn, 67 Ala. 381.

¹⁰ Schoverling v. Kovar, 15 Neb. 306.

¹¹ Bogert v. Haight, 9 Paige, 297.

¹² Schiele v. Healy, 10 Daly, 92; Vernon

v. Upson, 60 Wis. 418; Willis v. Bremner, 60 Wis. 622.

¹³ Stewart v. Slater, 6 Duer, 83.

¹⁴ Market Nat. Bank v. Hofheimer, 23 Fed. Rep. 13.

¹⁵ Adler v. Ecker, 2 Fed. Rep. 126.

¹⁶ Carter v. Rewey, 22 N. W. Rep. 129; Anstedt v. Bentley, 21 N. W. Rep. 807; Lucas v. Clafflin, 76 Va. 269.

¹⁷ Coffin v. Douglass, 61 Tex. 406; Donoho v. Fish, 58 Tex. 164.

¹⁸ Robb v. Stevens, Clarke, 192; Marsh v. Bennett, 5 McLean, 117; Price v. De Ford, 18 Md. 489; Yearsley's Estate, 1 Amer. L. Reg. 636. See Heye v. Bolles, 2 Daly, 231.

¹⁹ Smith v. Howard, 20 How. Pr. 121.

²⁰ Salsbury v. Ellison, 7 Colo. 167.

signment; and, the partner absconding, consent will be implied.¹ A partner who has not joined in an assignment of the firm assets may thereafter ratify the same, and a creditor may not question its validity because of his non-joinder;² but where one partner takes the firm assets and agrees to pay the firm debts, the partnership creditors may prove against his estate, and share *pari passu* with the separate creditors.³ As a separate creditor cannot be injured by a transfer of one partner's interest in the partnership property to his copartner, in consideration of the grantee assuming the liability of the firm.⁴

WHEN FRAUDULENT. An assignment which does not declare the uses, but reserves to the assignor to subsequently do so, is fraudulent and void;⁵ it is a fraud on the creditors, as it must necessarily hinder and delay.⁶ Where a deed conveyed integral amounts to a series of integer creditors, and its provisions were several, and does not provide for the contingency of some of the debts being fictitious, which they in fact proved to be, the amounts intended for them, not disposed of by the deed, remained in the grantor as to assailing creditors, and subject to their lien.⁷ It is absolutely necessary that the equitable interests in the assigned property shall be fixed and determined by the assignment itself;⁸ so the reservation of his right to determine the preferences at some future time renders it void.⁹ An attempt to assign partnership property for the purpose of paying the private debts of one of the partners, when the firm is insolvent, is conclusive of an actual fraudulent design;¹⁰ but it has been held that the assignment is valid though the appropriation is void.¹¹ When a power of revocation is reserved, the necessary inference is that it is made with intent to hinder, delay, or defraud creditors; for its only effect is to mask the property,¹² even though only to be exercised in case any creditor refuses to assent to the assignment.¹³ A power to make loans on the security of the estate is equivalent to a power of revocation.¹⁴ A reservation in a chattel mortgage of the right to dispose of the goods, is void with respect to creditors;¹⁵ and possession thereunder gives mortgagee no rights as against the mortgagor's creditors.¹⁶ A firm, in law, is distinct from the members who compose it, and a transfer of firm property to pay the separate debts of one partner is a voluntary conveyance; and where

¹ Sullivan v. Smith, 15 Neb. 476; S. C. 19 N. W. Rep. 620.

² Adey v. Cornell, 93 N. Y. 572.

³ In re Lloyd, 22 Fed. Rep. 90. See Smith v. Spencer, 73 Ala. 299.

⁴ Griffin v. Cranston, 10 Bosw. 1; S. C. 1 Bosw. 281.

⁵ Harvey v. Mix, 24 Conn. 406; Burbank v. Hammond, 3 Sum. 429; Grover v. Wake-man, 11 Wend. 203. See Sheldon v. Dodge, 4 Denio, 217. Strong v. Skinner, 4 Barb. 546; Moody v. Paschal, 60 Tex. 483.

⁶ Boardman v. Halliday, 10 Paige, 223; Barnum v. Hempstead, 7 Paige, 568; Gaz-zam v. Poyntz, 4 Ala. 374.

⁷ Market Nat. Bank v. Hofheimer, 23 Fed. Rep. 13.

⁸ Averill v. Loucks, 6 Barb. 470; Mitchell v. Stiles, 13 Pa. St. 306.

⁹ Averill v. Loucks, 6 Barb. 470.

¹⁰ Keith v. Fink, 47 Ill. 272; French v. Lovejoy, 12 N. H. 458; Hurlbert v. Dean, 2 Abb. App. 428; Kirby v. Shoonmaker, 3 Barb. Ch. 46; Cox v. Platt, 23 Barb. 126; Knauth v. Bassett, 34 Barb. 31; Ruhl v. Phillips, 2 Daly, 45; Lester v. Abbott, 28 How. Pr. 488; Heye v. Bolles, 33 How. Pr.

266; Wilson v. Robertson, 21 N. Y. 587; Henderson v. Haddon, 12 Rich. Eq. 393.

¹¹ Read v. Baylies, 35 Mass. 497; Nye v. Van Huse, 6 Mich. 329; Kemp v. Carn-ley, 3 Duer, 1; Nicholson v. Leavitt, 1 Sandf. 252; 6 N. Y. 510; 10 N. Y. 591; Las-sell v. Tucker, 5 Sneed, 1; McCullough v. Sommerville, 8 Leigh, 415; Gordon v. Can-non, 18 Grat. 387.

¹² Cannon v. Peebles, 4 Ired. Law, 204; Murray v. Riggs, 15 Johns. 571; S. C. 2 Johns. Ch. 565.

¹³ Hyslop v. Clarke, 14 Johns. 458.

¹⁴ Sheppards v. Turpin, 3 Gratt. 373.

¹⁵ Wells v. Langbein, 20 Fed. Rep. 183; Crooks v. Stuart, 7 Fed. Rep. 801; Robinson v. Elliott, 22 Wall. 513; Meyer v. Gage, 22 N. W. Rep. 892; Leaser v. Glaser, 4 Pac. Rep. 1026; Speigelberg v. Hersch, 4 Pac. Rep. 705.

¹⁶ Wells v. Langbein, 20 Fed. Rep. 183; Chenery v. Palmer, 6 Cal. 123; Delaware v. Ensign, 21 Barb. 85; Stein v. Munch, 24 Minn. 390; Dutcher v. Swartwood, 15 Hun, 31; Parshall v. Eggert, 54 N. Y. 18; Blakeslee v. Rossman, 43 Wis. 116.

the firm is insolvent, it is void¹ as to creditors, and a previous division of the property will not alter the rule.²

FRAUD MUST BE PROVED. The question whether a conveyance is made to defraud creditors in the first instance, is a question of fact,³ to be determined from all the facts and circumstances,⁴ and must be proved when the deed is alleged to be fraudulent.⁵ Fraudulent intent is generally a question of fact for the jury, and not for the court.⁶ It is never presumed when fairly reconcilable with honesty.⁷ The burden of proof is upon the party attacking the deed, to establish a fraudulent intent;⁸ it is on him who seeks to set aside the legal title.⁹

RESERVATION, WHEN FRAUDULENT. A debtor in failing circumstances cannot convey his property in trust and reserve to himself any benefit;¹⁰ such a reservation renders the assignment null, void, and of no effect,¹¹ if made to the exclusion of his creditors;¹² but the reservation of a secret benefit does not necessarily render such conveyance fraudulent as to creditors.¹³ There is a distinction between an express trust for the debtor and a benefit which is merely incidental to a trust created for another object.¹⁴ To render a deed of trust fraudulent, as matter of law, there must appear upon its face some express provision for the personal benefit of the grantor, or a stipulation wholly irreconcilable with an honest and legal purpose of paying his debts within a reasonable time.¹⁵ The debtor must part with his property free from any control over or interference with it, and from any contingency on which he may resume it at pleasure.¹⁶ An assignment differs from a mere security in passing both the legal and equitable title to the assignee absolutely, leaving no equity of redemption.¹⁷ Where the consideration expressed is far below the value of the property, as known to both parties, it is a strong circumstance to show fraud.¹⁸ He cannot, under pretense of paying his debt, assign more property than reasonably sufficient for the purpose.¹⁹ Where the assignment covers a great deal of property as security for a small amount of debts, so that the resulting interest of the debtor is really the valuable consideration, and the purpose professed is so obviously a mere pretense as not to conceal

¹ *Geortner v. Canajoharie*, 2 Barb. 625; *Burtus v. Tisdall*, 4 Barb. 571; *Dart v. Farmers' Bank*, 27 Barb. 337; *Walsh v. Kelly*, 42 Barb. 98; *S. C.* 27 How. Pr. 359; *Elliot v. Stevens*, 38 N. H. 311; *Ferson v. Monroe*, 21 N. H. 462; *Wilson v. Robertson*, 21 N. Y. 537; *Hartley v. White*, 94 Pa. St. 31. But see *Schaeffer v. Fithian*, 17 Ind. 463; *McDonald v. Beach*, 2 Blackf. 55; *Schmidlapp v. Currie*, 55 Miss. 597; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Sigler v. Knox Co. Bank*, 8 Ohio St. 511.

² *Burtus v. Tisdall*, 4 Barb. 571.

³ *Howe Mach. Co. v. Claybourn*, 6 Fed. Rep. 438; *Spaer v. Rood*, 51 Mich. 140.

⁴ *Morse v. Riblet*, 22 Fed. Rep. 501; *Livesay's Ex'r v. Beard*, 22 West Va. 585.

⁵ *Davis v. Kennedy*, 105 Ill. 300.

⁶ *Evans v. Rugee*, 23 N. W. Rep. 24; *Hyde v. Chapman*, 33 Wis. 392; *Barkow v. Sanger*, 47 Wis. 501; *Mehlhop v. Pettibone*, 54 Wis. 656; *Green v. Dixon*, 22 N. W. Rep. 943.

⁷ *Mey v. Gulliman*, 105 Ill. 272.

⁸ *Means v. Montgomery*, 23 Fed. Rep. 421; *Maish v. Bird*, 22 Fed. Rep. 576; *Tebbs v. Lee*, 76 Gratt. 744; *Clemens v. Brillhart*, 22 N. W. Rep. 779; *Long v. Wert*, 1 Pac.

Rep. 545; *First Nat. Bank v. Buck*, 23 N. W. Rep. 57.

⁹ *Adams v. Ryan*, 61 Iowa, 733.

¹⁰ *Kellog v. Richardson*, 19 Fed. Rep. 71.

¹¹ *Lawrence v. Norton*, 15 Fed. Rep. 853; *Baldwin v. Peet*, 22 Tex. 708; *Bailey v. Mills*, 27 Tex. 434; *Barney v. Griffin*, 2 N. Y. 365; *Leitch v. Hollister*, 4 N. Y. 211.

¹² *Muller v. Norton*, 19 Fed. Rep. 719; *Lawrence v. Norton*, 15 Fed. Rep. 853.

¹³ *Howe Mach. Co. v. Claybourn*, 6 Fed. Rep. 438.

¹⁴ *Curtis v. Leavitt*, 15 N. Y. 9; *Van Buskirk v. Warren*, 34 Barb. 457.

¹⁵ *Means v. Montgomery*, 23 Fed. Rep. 421; *McCormick v. Atkinson*, 78 Va. 8.

¹⁶ *Whallon v. Scott*, 10 Watts, 237. See *Planters' & M. Bank v. Clarke*, 7 Ala. 765; *Dana v. Bank of U. S. 5 Watts & S. 223*; *Hafner v. Irwin*, 1 Ired. Law, 490; *Janney v. Barnes*, 11 Leigh, 100; *Sheppards v. Turpin*, 3 Gratt. 373.

¹⁷ *Martin v. Hausman*, 14 Fed. Rep. 160; *State v. Benoist*, 37 Mo. 500; *Gale v. Mensing*, 20 Mo. 461; *Livesay's Ex'r v. Beard*, 22 West Va. 585.

¹⁸ *Bartles v. Gibson*, 17 Fed. Rep. 293.

¹⁹ *McNichols v. Rubelman*, 13 Mo. App. 515.

the true purpose, the debtor is obviously providing for himself and not for his creditors.¹ Where he conveys property on consideration of his maintenance and support, the conveyance is fraudulent and void as to creditors if any part of the consideration is to be paid in the future support of the grantor;² such conveyance will not be protected although full consideration was paid.³

PROVISIONS UNAUTHORIZED BY LAW. Any stipulation in an assignment intended to hinder or delay non-assenting creditors, if not warranted by law, is null and void.⁴ Provisions beyond the limits of the power which the law allows to be vested in the assignee, render the assignment void.⁵ An assignment which authorizes the assignee to dispose of the property in a way not authorized by law is void.⁶ So a deed is void which requires the assignee to sell choses in action before the lapse of time sufficient to enable him to collect by legal procedure.⁷ Unless authorized by law, a provision which authorizes the assignees in their discretion to dispose of the property on credit, vitiates the assignment,⁸ and is a badge of fraud;⁹ so an attempt to hinder and delay all creditors, even if there is no attempt to prefer any, is unauthorized by law.¹⁰ An assignment which attempts to confer on the assignee power to declare future preferences in his discretion is void;¹¹ but a conveyance to the assignee and his successors, which merely refers to such person as may lawfully succeed him in case of resignation, removal, or death, is not void.¹²

CONDITIONS IN. A deed stipulating that no creditor shall participate in the proceeds of the property unless he accepts the same in full satisfaction of his debt is valid; but to be valid, all the debtor's property must be conveyed.¹³ Where a participation in the assets depends upon the release of a balance due, and there is no provision for distribution of the surplus, it is *per se* fraudulent and void;¹⁴ and non-assenting creditors, not present when the deed was executed, are not bound by such an agreement of release.¹⁵

WHEN NOT FRAUDULENT. The mere fact that an assignment was voluntary and without consideration, will not support a finding that it was fraudulent;¹⁶ the *onus* is on the grantee to prove a valuable consideration,—recitals are not evidence in his favor.¹⁷ Where the deed was made on a fair consideration it is not necessarily void;¹⁸ but the motive or purpose is not material.¹⁹ A conveyance is not necessarily fraudulent because its effect is to hinder and delay, unless there was a contrivance for that purpose, and the grantee par-

¹ Moore v. Collins, 3 Dev. 126; Beck v. Burdett, 1 Paige, 305; Hastings v. Baldwin, 17 Mass. 552.

² Lawson v. Funk, 108 Ill. 502. A provision for future support made in good faith will not render the conveyance fraudulent, Barnett v. Knight, 3 Pac. Rep. 747; but the grantee may be held for the excess of the land over the consideration actually paid, Farlin v. Sook, 1 Pac. Rep. 123.

³ Buck v. Voreis, 89 Ind. 116.

⁴ Muller v. Norton, 19 Fed. Rep. 719; Jaffray v. McGehee, 2 Sup. Ct. Rep. 367; Keovil v. Donaldson, 20 Kans. 168; Bryan v. Sundberg, 5 Tex. 423; Donoho v. Fish, 58 Tex. 167.

⁵ Rapalee v. Stewart, 27 N. Y. 310; Bagley v. Bowe, 50 N. Y. Super. Ct. 100.

⁶ Schoolfield v. Johnson, 11 Fed. Rep. 297; Bartlett v. Teah, 1 Fed. Rep. 768; Sumner v. Hicks, 2 Black, 532; McCleery v. Allen, 7 Neb. 21; Rapalee v. Stewart, 27 N. Y. 310; Woodburn v. Mosher, 9 Barb. 255; Keep v. Sanderson, 12 Wis. 391.

⁷ Richardson v. Stapleton, 60 Miss. 97; distinguished in Wickham v. Green, 61 Miss. 463.

⁸ Muller v. Norton, 19 Fed. Rep. 720; Lawrence v. Norton, 15 Fed. Rep. 853; Moir v. Brown, 14 Barb. 39; Schufeldt v. Abernethy, 2 Duer, 533; Rapalee v. Stewart, 27 N. Y. 311; Hutchinson v. Lord, 1 Wis. 286; Keep v. Sanderson, 2 Wis. 42.

⁹ Carlton v. Baldwin, 22 Tex. 731; Live-
say's Ex'r v. Beard, 22 West Va. 585.

¹⁰ Malvin v. Wert, 19 Fed. Rep. 721.

¹¹ Moody v. Paschal, 60 Tex. 483.

¹² Langdon v. Thompson, 25 Minn. 509.

¹³ Dodd v. Martin, 15 Fed. Rep. 338; Clayton v. Johnson, 36 Ark. 406.

¹⁴ Seale v. Vaiden, 10 Fed. Rep. 831.

¹⁵ Id.

¹⁶ Genesee River Nat. Bank v. Mead, 92 N. Y. 637; George v. Kimball, 41 Mass. 234; Spear v. Rood, 51 Mich. 140.

¹⁷ Zelnicker v. Brigham, 74 Ala. 598.

¹⁸ McCanless v. Flinchum, 89 N. C. 373.

¹⁹ Goodman v. Wineland, 61 Md. 449.

ticipated in the design.¹ To render a deed founded on a valuable consideration void for fraud, both parties must concur in a fraudulent intent, or the grantee must have notice of such intent, or be in some way privy thereto.² The grantee with knowledge of the fraudulent intent makes himself a party to the fraud;³ so a mortgage which purposely exaggerates the mortgagee's demand, if known to him, is void as to creditors,⁴ even if given for full value.⁵ So, if grantee has knowledge of facts sufficient to excite the suspicion of a prudent man and put him on inquiry, he is a party to the fraud;⁶ but an assignee is not affected by the fraud of the assignor unless he co-operated or took with knowledge of the fraud.⁷ If the provisions of the deed manifest a real purpose to satisfy *bona fide* creditors in a reasonable time, with no unlawful intent towards other creditors, and without any substantial benefit to the grantor, no presumption of fraud arises from a provision for the retention of the possession, with power of disposition of the property by the grantor.⁸ If not fraudulent at its inception, it is not invalidated by subsequent delinquencies of the assignee;⁹ and subsequent acts of the debtor, or continuance of the business, is not proof of fraudulent intent.¹⁰

RESERVATIONS VALID. An exception in the conveyance, whereby the property is retained by the debtor and not conveyed to the assignee, is not a reservation of a benefit to the debtor, and does not vitiate the assignment.¹¹ A declaration that notes are accommodation notes, and providing for their return to the maker, will not justify an inference of fraud.¹² Unless the assignment is merely colorable, and made for the sake of the resulting trust, it is not void.¹³ Where one partner, with the consent of his copartner, assigns his individual estate and partnership assets to pay his private debts, there may be a reservation in favor of such copartner of a sum equal to his interest.¹⁴ A reservation to the debtor of what is left after payment of *all* his debts is proper,¹⁵ as what remains belongs to him by operation of law.¹⁶ The rule that there must be no provision for the benefit of the debtor does not apply to sales. A stipulation to take notes for part of the purchase money simply relates to the manner the property should be paid for by the purchaser.¹⁷

EXEMPT PROPERTY. Whatever is exempt from execution may be reserved to the debtor;¹⁸ and an express reservation of such property does not render

¹ Daniel v. Vaccaro, 41 Ark. 316.

² Means v. Montgomery, 23 Fed. Rep. 422.

³ Bartles v. Gibson, 17 Fed. Rep. 293.

⁴ Stinson v. Hawkins, 16 Fed. Rep. 850.

⁵ Stinson v. Hawkins, 13 Fed. Rep. 833.

⁶ Bartles v. Gibson, 17 Fed. Rep. 297; Atwood v. Impson, 20 N. J. Eq. 156; Baker v. Bliss, 39 N. Y. 70; Parker v. Conner, 93 N. Y. 118; Avery v. Johann, 27 Wis. 251; David v. Birchard, 53 Wis. 492; S. C. 10 N. W. Rep. 557. See Kaine v. Weigley, 22 Pa. St. 179.

⁷ Cannon v. Young, 89 N. C. 264.

⁸ Means v. Montgomery, 23 Fed. Rep. 421.

⁹ Olney v. Tanner, 10 Fed. Rep. 101; Hardmann v. Bowen, 39 N. Y. 200.

¹⁰ Olney v. Tanner, 10 Fed. Rep. 101.

¹¹ Moss v. Humphrey, 4 Greene, (Iowa,) 443; Dodd v. Hills, 21 Kan. 707; Bank v. Cox, 6 Me. 395; Ingraham v. Grigg, 21 Miss. 22; In re Walker, 18 N. B. R. 56; Carpenter v. Underwood, 19 N. Y. 520; Knight v. Waterman, 36 Pa. St. 258; Spencer v. Jackson, 2 R. I. 35; Baldwin v. Peet, 22

Tex. 708; Bates v. Ableman, 13 Wis. 644.

See Foster v. Libby, 24 Me. 448.

¹² Price v. De Ford, 18 Md. 489.

¹³ Wilkes v. Ferris, 5 Johns. 335.

¹⁴ Mandel v. Peay, 20 Ark. 325.

¹⁵ Sangston v. Gaither, 3 Md. 40; Beatty v. Davis, 9 Gill, 211; Wintringham v. Lafoy, 7 Cow. 735; Lindsay v. Guy, 57 Wis. 200.

¹⁶ Cross v. Bryant, 3 Ill. 36; Finlay v. Dickerson, 29 Ill. 9; Hollister v. Loud, 2 Mich. 309; Robins v. Embury, 1 Smedes & M. Ch. 207; Van Rossum v. Walker, 11 Barb. 237; Ely v. Cook, 18 Barb. 612; Gibson v. Walker, 11 Ired. Law, 327; Hoffman v. Mackall, 5 Ohio St. 124; In re Potter, 54 Pa. St. 465; Van Hook v. Walton, 23 Tex. 59; Farquharson v. McDonald, 2 Heisk. 404; Hall v. Denison, 17 Vt. 310.

¹⁷ Beach v. Bestor, 47 Ill. 521.

¹⁸ Garnor v. Frederick, 18 Ind. 507; Hollister v. Loud, 2 Mich. 309; Brooks v. Nichols, 17 Mich. 38; Smith v. Mitchell, 12 Mich. 180; Richardson v. Marqueeze, 59 Miss. 80; Dow v. Platner, 16 N. Y. 562; Mulford v. Shirk, 26 Pa. St. 473; Heck-

the assignment void, as creditors are not hindered or delayed thereby.¹ He cannot except from his general assignment property exempt from execution, when at the time of the assignment there were judgments against him in which he has waived the benefit of the exemption laws.² So the right to claim the benefit of the exemption law may be waived by laches.³ The claim must be made with such promptness as to occasion no delay to the one about to sell it.⁴ It is too late to claim the exemption after all the property is sold, the proceeds paid out in satisfaction of debts, and the assignee about to file his account.⁵ An assignment is not void which excepts property exempt by law.⁶ So the reservation of exempt property in an assignment by a firm will not invalidate the assignment.⁷ There is no obligation on the part of an assignor to make any selection of a homestead claimed by him as exempt;⁸ and the mere failure to claim the exemption until the morning preceding the sale will not waive the right.⁹ A merchant tailor, the head of a family and resident of the state, may exempt portions of his stock, as he may select, up to the statute limitation as to value;¹⁰ but if the reservation of what may be exempt by law gives the debtor the right to select the article, the assignment is void, as the assignee has no certain claim until selection is made.¹¹

RESERVATION OF SURPLUS. An express reservation to the debtor of the surplus remaining after payment of the debts or execution of the trust is not, as matter of law, fraudulent and void, as to creditors not provided for,¹² it raises no presumption of fraud;¹³ it is merely what the law would provide without the declaration, and does not interfere with, or vitiate the transfer.¹⁴ The doctrine that the reserve of the surplus renders the deed void, is placed on the ground that the effect is to lock up the property until the creditors provided for in the assignment are paid;¹⁵ and other creditors could not sue the interest of the debtor, subject to the assignment, as they could if it were a mortgage;¹⁶ but the opposite doctrine is held in other cases.¹⁷ The assignor's inter-

man v. Messinger, 49 Pa. St. 465; Sugg v. Tillman, 2 Swan, 208; McCord v. Moore, 5 Heisk. 734; Farquharson v. McDonald, 2 Heisk. 404; Overton v. Holinshade, 5 Heisk. 683.

¹ Hildebrand v. Bowman, 100 Pa. St. 580.

² Shaeffer's Appeal, 101 Pa. St. 45.

³ Chilcoat's Appeal, 101 Pa. St. 22.

⁴ Shaeffer's Appeal, 101 Pa. St. 45; Bowyer's Appeal, 21 Pa. St. 210; Davis' Appeal, 34 Pa. St. 256; Morris v. Shafer, 93 Pa. St. 489.

⁵ Chilcoat's Appeal, 101 Pa. St. 22.

⁶ Bates v. Simmons, 22 N. W. Rep. 335, First Nat. Bank v. Hinman, 21 N. W. Rep. 280.

⁷ McNair v. Rewey, 22 N. W. Rep. 339; following First Nat. Bank v. Hinman, 21 N. W. Rep. 280, and Goll v. Hubbell, 20 N. W. Rep. 674, and 21 N. W. Rep. 288.

⁸ Batten v. Smith, 22 N. W. Rep. 342.

⁹ Rice v. Nolan, 5 Pac. Rep. 437.

¹⁰ Id.

¹¹ Clark v. Robbins, 8 Kan. 574.

¹² Knapp v. McGowan, 96 N. Y. 75; Cooper v. Whitney, 3 Hill, 95; Curtis v. Leavitt, 15 N. Y. 9.

¹³ Means v. Montgomery, 23 Fed. Rep. 421.

¹⁴ Means v. Montgomery, 23 Fed. Rep. 421; Hempstead v. Johnston, 18 Ark. 123; Brown v. Lyon, 17 Ala. 659; Graham v.

Lockhart, 8 Ala. 9; Hindman v. Dill, 11 Ala. 689; Miller v. Stetson, 32 Ala. 166; Rowland v. Coleman, 45 Ga. 204; Conkling v. Carson, 11 Ill. 503; New Albany R. Co. v. Huff, 19 Ind. 444; McFarland v. Birdsall, 14 Ind. 126; Ely v. Hair, 16 B. Mon. 230; Johnson v. McAllister, 30 Mo. 327; Andrews v. Ludlow, 22 Mass. 28; Richards v. Levin, 16 Mo. 596; Moore v. Collins, 3 Dev. Law, 126; Vaughan v. Evans, 1 Hill, Ch. 414; Beck v. Burdett, 1 Paige, 305; Dickson v. Rawson, 5 Ohio St. 219; Floyd v. Smith, 9 Ohio St. 546; Dana v. Bank of U. S. 5 Watts & S. 223; Dance v. Seaman, 11 Grat. 778. Contra, Truitt v. Caldwell, 3 Minn. 364; Banning v. Sibley, 3 Minn. 389; Green v. Trieber, 3 Md. 11; Pierson v. Manning, 2 Mich. 445; Maberry v. Shisler, 1 Harr. (Del.) 349; Berry v. Riley, 2 Barb. 307; Barney v. Griffin, 2 N. Y. 365; Goodrich v. Downs, 6 Hill, 438; Lansing v. Woodworth, 1 Sandf. Ch. 43; Strong v. Skinner, 4 Barb. 546; Collomb v. Caldwell, 16 N. Y. 484; Dana v. Lull, 17 Vt. 390; Therason v. Hickok, 37 Vt. 454.

¹⁵ Dana v. Lull, 17 Vt. 390.

¹⁶ Leitch v. Hollister, 4 N. Y. 211; Dunham v. Whitehead, 21 N. Y. 131; McClelland v. Remsen, 23 How. Pr. 175.

¹⁷ Graham v. Lockhart, 8 Ala. 9; Ely v. Hair, 16 B. Mon. 230; Murray v. Riggs, 15 Johns. 571; Austin v. Bell, 20 Johns. 442;

est in a possible surplus is not an interest in the property assigned, which can be asserted in an action to determine adverse claims.¹ The assignor may make what disposition he pleases of the reserved property.² There may be a provision in the assignment that the surplus shall be paid to the debtor or creditors in the discretion of the assignee.³ Partners in making assignment of firm property to discharge firm debts, may direct the residue to be returned to them, to be divided according to equitable interests of each, leaving each to pay his private debts out of his own individual property;⁴ and such assignment is not fraudulent,⁵ as the law itself creates a resulting trust in their favor as to such surplus.⁶ Where the assignee includes both individual and partnership property, the surplus cannot be reserved without providing for individual debts;⁷ but proof must be given that there are separate debts,⁸ and it is void if the surplus is reserved without providing for the separate debts;⁹ but where no surplus is expected, the omission to so provide does not affect the transfer;¹⁰ and evidence is admissible to show that there is no surplus after payment of the partnership debts;¹¹ so where it is shown that the omission was the result of haste or inadvertence.¹² An appropriation without discrimination renders the deed fraudulent; so if it authorizes the property of a solvent debtor to be applied in part to pay the debts of another, for which neither he nor his property is in any way bound, before his own just debts are satisfied.¹³ Where it appears that sufficient property was retained by the debtor to pay his other creditors, the conveyance is valid.¹⁴ The state statutes have reference only to assignments for the benefit of all creditors;¹⁵ and a conveyance of all property to trustees to pay a portion of the creditors, the surplus to be returned to the debtor, leaving his other creditors unprovided for, is fraudulent and void as to them;¹⁶ but evidence may be given of no individual debts, and the burden of proof is on the parties claiming under the instrument.¹⁷

APPLICATION OF PROPERTY. Partnership property may be applied to the payment of debts not partnership debts, but for which all the partners are bound.¹⁸ So money loaned to a stockholder may be shown to have been used for the benefit of the corporation, and is a good consideration for a transfer made by the latter to the creditor.¹⁹ An appropriation of the firm property to pay individual debts is not, it seems, a ground for setting aside the assignment at the instance of an individual creditor, as he cannot in any manner be affected by it.²⁰ Where separate property assigned by each partner exceeds the amount of his separate debts, a direction that the separate debts shall be paid out of the partnership property will not vitiate the assignment.²¹ Debts

Skipwith v. Cunningham, 8 Leigh, 271; Janney v. Barnes, 11 Leigh, 100 Marks v. Hill, 15 Grat. 400.

¹ Donohue v. Ladd, 31 Minn. 244.

² Hildebrand v. Bowman, 100 Pa. St. 580.

³ Kneeland v. Cowles, 4 Chand. 46.

⁴ Bogert v. Haight, 9 Paige, 297; Butt v. Peck, 1 Daly, 83; Hubler v. Waterman, 33 Pa. St. 414. See Goddard v. Hapgood, 25 Vt. 351; Eyre v. Beebe, 28 How. Pr. 333.

⁵ Collomb v. Caldwell, 16 N. Y. 484;

Collumb v. Read, 24 N. Y. 505.

⁶ Bogert v. Haight, 9 Paige, 297.

⁷ Collomb v. Caldwell, 16 N. Y. 484.

⁸ Bogert v. Haight, 9 Paige, 297.

⁹ Goddard v. Hapgood, 25 Vt. 351.

¹⁰ Doremus v. Lewis, 8 Barb. 124; Bishop v. Halsey, 3 Abb. Pr. 400; Spies v. Joel, 1 Duer, 669.

¹¹ Turner v. Jaycox, 40 N. Y. 470. Contra, Smith v. Howard, 20 How. Pr. 121.

¹² Hooper v. Tuckerman, 3 Sandf. 311.

¹³ Smith v. Howard, 20 How. Pr. 121; O'Neil Salmon, 25 How. Pr. 246;

Kitchin v. Reinsky, 42 Mo. 427.

¹⁴ Knapp v. McGowan, 96 N. Y. 75.

¹⁵ Knapp v. McGowan, 96 N. Y. 75; Tie-meyer v. Turnquist, 85 N. Y. 522.

¹⁶ Knapp v. McGowan, 96 N. Y. 75.

¹⁷ Hurlbert v. Dean, 2 Keyes, (N. Y.,) 97. Contra, Lester v. Abbott, 28 How. Pr. 483.

¹⁸ Smith v. Howard, 20 How. Pr. 121.

¹⁹ Catkins v. Lockwood, 16 Conn. 276; Gardner v. Webber, 34 Mass. 407; Goddard v. Sawyer, 91 Mass. 78; U. S. v. Hoove, 3 Cranch, 73.

²⁰ Morrison v. Atwell, 9 Bosw. 503.

²¹ Hollister v. Loud, 2 Mich. 309; Van Nest v. Yoe, 1 Sandf. Ch. 4; Knauth v. Bassett, 34 Barb. 31.

provided for in an assignment of the individual property must be those for which the debtor is liable jointly with others, or severally and alone. If he is liable, the appropriation cannot be fraudulent.¹ A direction that property shall be distributed among creditors according to their respective equities is good.² After a partnership creditor has exhausted the firm assets he is entitled to come in equally with separate creditors under an assignment by one partner.³ A provision cannot be made for debts which the separate partners may have against the firm, before the firm creditors are paid;⁴ but a note given to a former partner upon his withdrawal, may be provided for.⁵ The general rule now is that when all the partners are in bankruptcy the separate estate of one partner shall not claim against the joint estate of the partnership in competition with the joint creditors, nor the joint estate against the separate estate in competition with the separate creditors;⁶ but if there is no joint estate, firm creditors have the right to share in the separate estate.⁷

ATTORNEY'S FEES. It is no objection to a conveyance in trust for the benefit of creditors that a provision is made for the payment of a reasonable attorney's fee for examination of facts, advice, or drawing up the assignment; but the debtor cannot contract with attorneys for future services.⁸ The reasonable and proper charges incurred by the assignee in the employment of attorneys may be properly embraced in the items of expenses;⁹ but the assignment cannot designate the attorney to be employed by the assignee.¹⁰ The payment of attorney's fees is not such a preference as will bar a discharge.¹¹—[Ed.]

¹ Fox v. Heath, 16 Abb. Pr. 163; O'Neil v. Salmon, 25 How. Pr. 246; Eyre v. Beebe, 28 How. Pr. 333; Kirby v. Schoonmaker, 3 Barb. Ch. 46; Van Rossum v. Walker, 11 Barb. 237; Newman v. Bagley, 33 Mass. 570; French v. Lovejoy, 12 N. H. 458; Gadsden v. Carson, 9 Rich. Eq. 252. See Jackson v. Cornell, 1 Sandf. Ch. 348.

² Heckman v. Messinger, 49 Pa. St. 465; Maennel v. Murdock, 13 Md. 264.

³ Gadsden v. Carson, 9 Rich. Eq. 252. See Black's Appeal, 44 Pa. St. 503; Fellows v. Greenleaf, 43 N. H. 421; Pennington v. Bell, 4 Sneed, 200.

⁴ Goddard v. Hapgood, 25 Vt. 351.

⁵ Mattison v. Demarest, 4 Robt. 161; Blow v. Gage, 44 Ill. 208; Smith v. Howard, 20 How. Pr. 121.

⁶ In re Lloyd, 22 Fed. Rep. 90; In re Lane, 10 N. B. R. 135.

⁷ In re Lloyd, 22 Fed. Rep. 90.

⁸ Hill v. Agnew, 12 Fed. Rep. 230.

⁹ Jacobs v. Remsen, 36 N. Y. 668; Butt v. Peck, 1 Daly, 83; Iselin v. Dalrymple, 27 How. Pr. 137; S. C. 2 Robt. 142.

¹⁰ Hill v. Agnew, 12 Fed. Rep. 230. Contra, Baldwin v. Peet, 22 Tex. 708.

¹¹ In re Boynton, 10 Fed. Rep. 277.

ST. LOUIS, K. C. & C. RY. CO. v. DEWEES and others.¹

(Circuit Court, E. D. Missouri. March 24, 1885.)

INJUNCTIONS—SCRAMBLE FOR POSSESSION—RAILROADS.

Where there is a dispute as to the possession and right of possession of a railroad track, which is not in the actual possession of either party to the controversy, this court will not interfere by injunction.

In Equity.

Noble & Orrick, for complainant.

Davis & Davis, Farrish & Jones, Harris & Dewees, and Nathan Frank, for defendants.

BREWER, J., (*orally*.) In this case, as I intimated to counsel, I have read all the affidavits through carefully, and these facts suggest themselves to me as material: It appears that some years ago there was a corporation called the "Forest Park Railroad Company," which gave a trust deed to secure certain bonds to the amount of \$50,000. A year or two after, it gave a second trust deed to secure several hundred thousands, as I remember, of bonds, and the allegation of the bill is that \$50,000 of these bonds were used to cancel the \$50,000 covered by the first trust deed, and that only \$200,000 of the bonds secured by the second trust deed were issued. Thereafter this company, which had already completed a small fragment of a road, entered into a contract with certain parties for further work; in pursuance of which, the contractors, Knapp & Co., by themselves and subcontractors, did a certain amount of work. Receiving no pay and having filed liens, the subcontractors proceeded in this court to bring two actions, obtained judgments, decrees, and orders for the sale of the property. In these actions the company alone was made defendant; that is, the trustees in the first or second mortgages were not made parties. Upon the decrees a sale was made, and the property sold to Messrs. Dyer and Garland. The sale was confirmed and a deed made by the marshal, and the purchasers last fall sold the property to the plaintiff. At the time of this sale Mr. Shultz, represented by the bill to have been the vice-president and actual manager of the railroad company, was present in the office of Col. Dyer, where the papers were executed, and said, "I assent to the transfer of possession." As a matter of fact, all there was of the property of the company was a road-bed about three miles in length, upon which no cars were running; it was unoccupied, dead property. After the sale, Mr. Shultz accepted employment from the plaintiff, and received pay for his services in looking after the property, etc. Last February the directors of the original company made a lease to a Mr. Parker, and thereupon Mr. Parker attempted to resuscitate this dead track and to put it in a condition for operation. In so

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

doing he encountered the representatives of the plaintiff, who claimed possession, and said to him, "You have no right to possession." That is the way the testimony, as I read it, shapes itself before my mind; and the question, which is very suggestive, is whether this does not come within what parties sometimes and very appropriately term "a scramble for possession," as to which the courts seldom interfere in an equitable proceeding.

Now, as I read the affidavits, here is an unoccupied, abandoned, dead track, and during the winter, at least, in the actual possession of nobody; the defendant claiming the right of possession under a lease from the original company, the plaintiff claiming the right of possession under certain decrees and sale, but no settled, absolute grasp of possession. Under these circumstances, should a court interfere by injunction to say in favor of one party or the other, "Your possession shall be protected, and the other party restrained?" My brother TREAT has not read all the affidavits, and perhaps if he reads them he may come to a different conclusion.

Mr. Orrick. There are a great many affidavits, and perhaps your honor may have overlooked some of them.

The Court, (BREWER, J.) I addressed myself to the question of possession first.

Mr. Orrick. Yes, if there is a scramble for possession.

The Court, (BREWER, J.) You cannot get an injunction against mere trespassers. The court might appoint a receiver and put both out of possession; but where there is a scramble for possession, I do not think the court ought to move by way of injunction.

Mr. Orrick. We understand that, and our position is, as far as the question of possession is concerned, there should be no question about it, upon the facts as we understand them to be, and as is shown by all these papers here.

The Court. Where you foreclose a lien of that kind, or of any kind, and the marshal sells the property, unless there is a specific order from the court to the marshal to take possession and transfer it, whatever legal rights you may have to the possession, do you get the possession? That is the trouble. You had a decree which said, "Sell this property." The property was sold. The purchaser had the right to possession. Now, how did he get possession? Did Mr. Shultz, by reason of the fact that he was vice-president and general manager, as you allege, have the right to say, "I will turn this property over, and give possession?" Because, unquestionably, here was a road-bed running some three miles in length, nobody operating or doing anything with it, just a dead road-bed.

Mr. Orrick. Three miles of track, and several thousand dollars' worth of personal property.

The Court, (BREWER, J.) But there was nobody there.

Mr. Orrick. But we put somebody there once under our deed and according to our deed.

The Court, (BREWER, J.) That comes back to the question, what right had Mr. Shultz, the vice-president, to turn over possession? Did it not require the action of the directors of the corporation itself?

The Court, (TREAT, J., orally.) The way the question shapes itself to my mind is this. You had your special decree for your lien; how did you gain possession? If there was an action at law as in ejectment, and recovery had, the marshal would put you in possession under a writ of *habere facias*; but being in equity, it is not necessary, of course, that you should go through all these formal proceedings. Now the question Brother BREWER suggested is, the adverse party did surrender possession. That is a simple matter of fact. As you say, Mr. Shultz, the vice-president and actual manager, told you to go and take it. That is all.

The Court, (BREWER, J.) As I said this morning, I read the papers over last night and I came to a conclusion as to what should be done in the matter, and I was anxious that my brother TREAT should read the papers also, as he has done during recess, and he is of the same, or very nearly the same, opinion that I have expressed; so it seems to us that further argument is unnecessary; that there is not that clear showing of an actual, undisturbed, absolute possession of this property which will justify the court in restraining outside parties from interfering. We this morning got into a discussion of some matters outside of the present question as to the ultimate rights of the parties; and, whatever opinions were hastily expressed on the spur of the discussion, of course neither of us feel under any obligations to hold to, when the ultimate rights of the parties come to be considered. The question is really whether, at the time this suit was instituted, there was that quiet, undisturbed, clear, and absolute possession which a court will protect against intruders. As a matter of fact, the property was an unoccupied roadway, just like a quarter section of land on which there was no improvements, and no occupation.

Mr. Orrick. Three miles of track completed, if the court please.

The Court, (BREWER, J.) Of course; but, upon the present showing, we agree that there is no such condition of things as would justify the court in granting the restraining order.

Mr. Orrick. In the view of the matter, would your honor be ready to entertain an application for a receiver? Here is a dispute liable to result in bloodshed to the contending parties, and we think the court ought to interpose.

The Court, (BREWER, J.) Before an application for receiver is entertained there should be notice given.

Mr. Orrick. I think we have a right to protect our rights in order to avoid trouble of that kind, and that the property may be preserved to whom it may belong. We ask your honor, therefore, to appoint a receiver to take charge of this property, and in the interests of peace, and we think the facts will justify such action.

The Court, (BREWER, J.) You ought to give notice of an application of that kind.

Mr. Orrick. The parties are in court.

The Court, (BREWER, J.) They might not wish to take it up without having a chance to prepare.

Mr. Orrick. I give notice now, that it may be heard to-morrow.

The Court, (TREAT, J.) The proposition involved is a very simple one. Your bill is a bill of peace, resting on possession by you, which the court asks you to show. Looking at your affidavits, you do not show that actual possession which the court requires in order to interfere, and when we look to the affidavits on the other side, the weight of the testimony is just the other way. There is somebody else in possession. On that state of facts the court has to pass, and that is all, on a motion of this kind. The rights of the parties, as ultimately they may be determined, is another question. The court cannot interfere in a scramble for possession, or give an injunction against trespassers; and on the other hand, of course, there is no trespass unless you have possession, and parties interfere when you were in possession. Hence, under all the rules concerning these matters, I do not see that an injunction can go. You must rest on the ultimate determination of these matters. Now, in regard to this other matter suggested, I only intimate (I have not consulted Brother BREWER in regard to it)—I do not see how, looking at the papers, if a man is building a road for you which belongs to you—

Mr. Noble. I wish to interrupt the court, simply to say that parties are present, and lest they might make a mistake about this matter, and think the court was deciding that they had possession, and base some action upon it, I think it well for the court, in view of the serious consequences that may occur on account of this, that it ought to be impressed upon them that there is no decision that they have possession.

The Court. As I say, it occurs to me that this is merely a scramble for possession.

Mr. Noble. And that scramble goes on, and each man decides for himself.

The Court. If you desire a receiver, notice should be given to the other side, that they may be ready, because that presents other questions.¹

¹ *Ante*, 519.

GLENN v. DORSHEIMER and others.¹

SAME v. HUNT.

SAME v. LIGGETT.

SAME v. FOY.

SAME v. PRIEST.

SAME v. DAUSMAN.

SAME v. VON PHUL.

SAME v. SCOTT and another.

SAME v. TAUSSIG and another.

SAME v. TRIPLETT.

SAME v. DIMMOCK and another.

SAME v. NOONAN and others.

SAME v. LUCAS and others.

SAME v. LOCKWOOD and others.

(Circuit Court, E. D. Missouri. April 9, 1885.)

1. STATUTE OF LIMITATIONS — LIABILITY OF STOCKHOLDERS IN CORPORATION WHICH HAS CEASED TO DO BUSINESS.

Where an insolvent corporation ceases to do business, and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor, and against such creditors and trustees, immediately.

2. SAME—CIRCUITOUS METHOD OF COLLECTION.

Where the law furnishes a party with a simple method of proceeding against an ultimate debtor, he cannot prevent the statute of limitations from running against him by attempting to collect his debts by a circuitous legal proceeding.

Demurrers to Bills and Petitions.

The demurrers in all the above-entitled cases were passed upon in the following opinion. The period within which suits of this character must be brought, under the Missouri Statutes, (section 3230,) is five years. The other material facts are sufficiently stated in the opinion of the court.

T. K. Skinker, for plaintiff.

W. H. Clopton, for Dorsheimer, Foy, Priest, Lucas, and others.

C. M. Napton, for Hunt.

Smith & Harrison, for Liggett and Dausman.

Walker & Walker, for Von Phul.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

Wilbur F. Boyle, for Scott and others.

Geo. W. Taussig, for Taussig and others.

Thos. C. Fletcher and *Geo. D. Reynolds*, for Triplett, Noonan, and others.

Dryden & Dryden, for Dimmock and others.

Noble & Orrick, for Lockwood and others.

BREWER, J., (*orally*.) There is a confused mass of law in the books bearing on the questions which are involved in these cases. In a general way, the facts as stated in the petitions in the law cases, and the bills in the equity suits, are that the National Express Company was organized on the twelfth day of December, 1865; it continued in business until the twentieth day of September, 1866, less than one year. The defendants are charged as stockholders in that corporation. An assignment was made of all the properties of the company, all debts due to it, whether from stock subscriptions or otherwise. This assignment was made on the twentieth of September, 1866. Nothing, then, seems to have been done until November 28, 1871, more than five years thereafter, when one creditor brought his bill in the chancery court of Richmond, Virginia, in behalf of himself and other creditors, to establish his and their claims against the company, and compel an assessment upon the stockholders. These proceedings terminated in a decree in that court on the fourteenth day of December, 1880, more than nine years thereafter, by which debts were established against the company to the amount of half a million dollars and over, an assessment of \$30 a share ordered, the assignees removed, and the present plaintiff appointed as trustee. Between three and four years after that, these suits were commenced in this court; so that 18 years after the established insolvency of the company, its cessation of business, its assignment of its property, for the first time these defendant stockholders are notified that they have to pay something to discharge the debts of the corporation.

Passing all other defenses, the single one that we shall notice is that of the statute of limitations. These subscriptions, as I say, were payable on the call of the corporation; and the first call was made in 1880. So it is argued by counsel for the trustee that the statute of limitations begins to run then, and then only; that the obligation of the stockholders is a conditional obligation, becoming absolute only when the call has been made. On the other hand, counsel for the defendant read to us some cases in Pennsylvania, which affirm that the obligation of stockholders in a corporation similar to the one before us, is like the obligation of one who has given a note payable upon demand, where the statute of limitations commences to run within a reasonable time, and it is assumed that the demand is, or must be, made at once. I cannot assent to that doctrine as broadly as stated by the supreme court of Pennsylvania, and I think the court in Mississippi has drawn a wise distinction. The obligation in the first instance is a conditional obligation. The stockholders are not

to pay until a call has been made. As was suggested in the argument, these debts due by the stockholders to the corporation are its assets, and furnish its means for transacting business, and so long as the corporation is a going concern, doing business, it may not need to have these obligations called in; and so, while it is a going concern, I think it is fair to say, as is said by the supreme court of Mississippi, that theirs is a conditional obligation, and that while the corporation continues to transact business, whether 5, 15, or 50 years, the stockholders' liability continues and becomes absolute only after a call is made. But that is not this case, and the court in Mississippi draws the distinction very nicely. In 1866 this corporation ceased to do business. It ceased to be a going concern. It turned over its property, including the debts due from its stockholders, to the assignees, to collect its debts, dispose of its property, and pay its creditors. Whenever such a cessation of business occurs, it seems to me fair to say that the liability of the stockholders becomes absolute, —a fixed, unconditional obligation. And, although no call be made by the company, or by the assignees, yet these debts from the stockholders could have been reached by the creditors. That seems to be settled by the decision in *Ogilvie v. Insurance Co.* 22 How. 380, where the supreme court held that creditors, who had reduced their claims to judgment against the corporation, might proceed directly by bill against one or more stockholders. The language is this:

"The objection made to the bill, for want of proper parties, is equally untenable. The creditors of the corporation are seeking satisfaction out of the assets of the company, to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders, partners, proprietors, or debtors. If A. is bound to pay his debt to the corporation in order to satisfy its creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction out of B."

The court adds further:

"It is true, if it be necessary to a complete satisfaction to the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company and administer upon its assets, and in this way stockholders or debtors may be made to contribute."

While such is a proper proceeding, of course, yet the court affirms the right of a creditor to reduce his claim to judgment in a court of law and proceed against one or more stockholders; and that which is true of one creditor is true of all. In the aggregate, all the creditors can have no greater rights than as individual creditors. So these creditors could have reduced their claims against the corporation to a judgment, immediately after the assignment in 1866, through the simple processes of an ordinary action at law, and then brought their bill against the various stockholders to enforce payment here or elsewhere.

The same doctrine is recognized by Judge McCrory in the case of *Holmes v. Sherwood*, 3 McCrory, 405, S. C. 16 FED. REP. 725, and is the settled law of federal courts.

The case of *Scovill v. Thayer*, 105 U. S. 143, relied on by counsel for plaintiff, does not at all oppose this view, and does not overrule the case of *Ogilvie v. Insurance Co.*, for there the contract between the corporation and the stockholder was that the stock was to be treated as fully paid, although in fact it was only partially paid; and, as between the corporation and its stockholders, that was a valid contract, which the corporation as such could not repudiate, and it needed the interposition of a court of equity or a court of bankruptcy to establish the fact that, as between the creditors and the stockholders, that contract was no protection to the stockholders. Yet even there the court says, (and counsel rely rather on some *dicta* in the opinion than on the actual decision:)

"The rule is this. It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it, and the court will do what it is the duty of the company to do. But under such circumstances, [and to this our attention was especially called,] before there is any obligation upon the stockholder to pay, without an assessment and call by the company, there must be an order of a court of competent jurisdiction, or at the very least some authorized demand upon him, for payment; and it is clear the statute of limitations does not begin to run in his favor until such order or demand."

Counsel emphasized the words "some order of a court of competent jurisdiction," but there is added to it "some authorized demand." When a creditor, having his claim reduced to judgment, commences his suit in equity, that is an authorized demand.

A distinction should be noticed between this case, where the stockholders, not having paid their subscriptions in full, are simply debtors to the company for the unpaid portions, and those cases where a double liability is by statute cast upon the stockholders, in reference to which I find, in some of the opinions, language inappropriate to a case of this kind; and also those other cases, some of which went from Georgia to the supreme court, where a stockholder is held to be directly liable to certain creditors of the corporation; in one case, the stockholders being adjudged directly liable to the holders of bills issued by the bank in which they were stockholders. Of course, those are cases involving other considerations.

It was said in the argument, and our attention was called to the case of *Fogg v. Railroad Co.* 17 FED. REP. 871, decided in this court two or three years ago, that these creditors pursued an ordinary and proper way of enforcing their claims, and having pursued that ordinary and proper way, and as to each step in that way keeping themselves within the limits of the statute of limitations, they are not prejudiced by the delay. Thus, within six years after the assignment, they commenced proceedings to establish their claims against the

company, and they proceeded in the ordinary course of litigation in the chancery court and obtained an order for a call in that court, and then sued on that call within six years after it was made, and so, there being no statute of limitations interfering with each separate step in the course pursued, the courts must say that the statute of limitations does not cut off this action. That case of *Fogg v. Railroad Co.* does not justify any such conclusion as that. That was a case where one corporation having property turned it over to another, and the creditor, instead of pursuing directly the grantee company, established his claim in an action at law against the grantor company, and then by a bill in equity, filed at once, proceeded against the grantee company. The statute was held no bar. But here the creditor in the first instance had an open, ordinary, direct, and simple way of collecting his debts from the stockholder, and I do not think that he may follow any other way that he sees fit, and say that, although the statute of limitations would have cut off the simple and direct way, yet it did not happen to interfere with the various steps pursued in the way around to reach the stockholders; for certainly there should be some limit. If this theory were correct the stockholder might at the end of 18 years, as in this case, or of 25, 30, or 50 years, be confronted with a claim. Where the law furnishes to a party a simple method of proceeding against an ultimate debtor, and he fails to pursue that, I think such debtor can appeal to the statute of limitations as a protection.

There are many cases involving these questions. As I said in the outset, there is a confused mass of learning in the books as to the liabilities of stockholders to creditors of corporations. We have looked at the authorities carefully, and studied the questions as fully as we have had time, and our conclusions are that the demurrers must all be sustained.

TREAT, J., (*orally*.) I concur most fully in the judgment announced. I emphasize one proposition. Here was a corporation of short continuance; and I think, under the very terms of the act of corporation, only two dollars a share were primarily to be paid up. If any more was to be thereafter paid, it was to be paid when the directors of the corporation called therefor. The original amount was paid, and the parties rested there. It seems to have been a very unfortunate concern; for it had hardly begun operating before, practically, it was dissolved; and the amount of indebtedness shown by the proceedings in chancery at Richmond was incurred—to what end we know not, and it is immaterial. Three assignees were appointed, with full authority to collect all the assets and pay the obligations of the company; the stockholders being scattered, it seems, all over the country, at least as far as Missouri. There is nothing to indicate that they were to be called upon, or charged, except through calls, with the indebtedness to the original corporation. If assignees were

substituted to the rights of the original corporation, to call in these assessments, why did not these creditors move? They could have asked and demanded that the assignees should do—what? Proceed at once to make a call. But they did not do it. They filed a bill in 1871, more than five years afterwards, and, for reasons unknown to this court, that was prolonged until 1880, when that court thought there should be a call on the stockholders to meet these demands, and then the substituted assignees rested until 1884. Under the statutes of limitations, which are statutes of repose, and under the theory of laches in equity, a man cannot patch out, by proceedings of this nature, an indefinite extension of time. As stated by my brother judge, if he can do it for 18 years, or more, he may do it for 50 years. The right of the creditor existed against the corporation at the time the assignment was made. Why did not he pursue it? He had the right so to do. He never did it. He must take the consequences of the delay.

PILLA and another v. GERMAN SCHOOL Ass'n and another.¹

(Circuit Court, E. D. Missouri. April 24, 1885.)

1. DESCENT AND DISTRIBUTION—ALIENAGE.

The law existing at the time of descent cast, governs the right of aliens to inherit realty.

2. SAME.

Under the Missouri statutes existing in 1860, aliens could not inherit realty.

3. EQUITY PRACTICE IN REMOVED CASE.

Where a suit, embracing both an equitable and legal cause of action, is instituted in a state court and removed to this court, and the equitable cause of action stated is held bad on demurrer, the bill will be dismissed, and the complainant left to pursue his remedy at law.

In Equity. Demurrer to bill.

Louis Gottschalk, for complainants. *Henry Hitchcock* and *Hugo Muench*, for defendants.

TREAT, J., (*orally*.) This case, instituted in the circuit court of the city of St. Louis and removed here, involves some questions which have been presented in part only to the court.

The plaintiffs in the suit are a Mrs. Maria Pilla and Maria Parazolt, her husband joining, residents of France, daughters, as they claim, of one Gabriel Andre, who died in this country in November, 1860, leaving a will. In that will, so far as its provisions are stated, the decedent recited that he had a wife in France, from whom he had been separated; that a son was born a great many years antecedent to the will, who died at the age of 11 months. There were two supposed daughters, to one of whom he left the sum of one dollar, averring, as

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

the reason for so doing, that she was not his child, but illegitimate. The bill itself does not separate the two daughters who are plaintiffs therein as to which one had been cut off with a dollar, but avers that they are the legitimate daughters, both of them, of the decedent, and they sue jointly for their portions of the estate. It is obvious that if he chose to cut off one of the two, whether legitimate or illegitimate, and made a disposition of his property as to one only, the unnamed one would not lose her interest in the estate; but which was the one? He did not name her. There are two. One has been disposed of by the will; but which one? Without commenting any further in regard to that, it must suffice, for the purposes of this case, that, whether one or the other was the daughter unnamed and unprovided for, the court would not know which was the one until further investigation. That would present a controversy among themselves. How could the forms of that litigation arise? Concerning that I have nothing to say, because there is a question that disposes of the case, and which underlies the whole matter.

The case of *Sullivan v. Burnett*, tried in this court, and affirmed by the supreme court of the United States, (105 U. S. 334,) and the *Case of De Franca*, 21 FED. REP. 774, decided at the last term of this court by Justice MILLER, are conclusive, so far as the realty is concerned: namely, that at the time of descent cast, November, 1860, the rights of the parties were fixed according to the statutes then existing with regard to aliens. It is a matter of astonishment to me, however, that while I tried the case of *Sullivan v. Burnett*, and the act of February 18, 1855, was before me, and also before the supreme court when it passed upon that case and affirmed the judgment of this court, yet the act of November, 1855, was not referred to in that case, and not referred to in this case. If Wagner's Revision of 1870 is a correct revision, I find, without going back to the original statutes, that there was a strange omission on the part of this court, and consequently on the part of the supreme court of the United States, to notice that act. Had it been noticed, it would not, however, have affected the result. The act of February, 1855, so far changed the old law that an alien could not inherit realty; as to permit the alien to take and sell within three years after the death of the ancestor. Subsequently, a statute was passed, and that is the act to which I refer, and to which no allusion is made, either by this court or the supreme court, in the determination of that case, to-wit, the act of November, 1855, concerning the time within which they might dispose of the property, which, but for alienage, would descend in fee to them, limiting the power to sell it to three years after administration had. That was the condition at time of descent cast. Then, taking the most liberal view for these plaintiffs of the statutes then in force, what is the result? Gabriel Andre died November, 1860; at that time he had two married daughters in France; the administration was closed in 1868; these daughters did not move with respect thereto until March, 1884.

Under the most liberal construction that could be given to these statutes, the right of these parties to sue, so far as the realty was concerned, ended three years after administration, to-wit, in 1871; hence any rights that they might have had, under the statutes, pertaining to realty here, ceased in 1871.

But the structure of this so-called bill calls for a great many exceptions, which may be disposed of by a simple comment. Proceedings were instituted in the state court, where legal and equitable matters may both be pursued in the same case. These parties claimed their supposed interest in the realty, but after the remarks already made, it will be seen they had none. They also claim an interest in certain personalty in the hands of the residuary legatees, namely, \$4,000. Now, if they sued at law, the statute of limitations might be interposed; if they sued in equity, the doctrine of laches. But the bill being one of those mixed bills, it comes here without having been reformed. It should have been reformed to comply with the equity rules of this court. That, however, would be a mere matter of formal proceeding; because leave would be granted for the parties to make such changes pertaining to the form as would preserve their rights under the equity rules prescribed by the supreme court. But there can be no phase of the case which would bring them here on the equity side of the court, under what has already been said, namely, that they have no interest in the realty at all. Consequently, if they are not barred by the statute of limitations, their remedy is adequate at law for money had and received. The result is that this bill, as it stands before the court, is undoubtedly defective, not for form only, but for substance. Eliminating the realty from this controversy, there is nothing left but an ordinary money demand; and plaintiffs must sue at law for that.

The case that went to the supreme court, (of *Sullivan v. Burnett*, 105 U. S. 334,) and that of *De Franca*, decided at the last term, Justice MILLER giving the opinion, are conclusive so far as the realty is concerned. As to a demand for money had, it is to be pursued by an action at law. It is for the parties to say whether, with the statute of limitations before them, they choose to bring a proper action with regard to the money demand, or leave the matter as it is.

The demurrer is sustained, not for technical objections which have been presented, and which it would be very proper to consider had there been an original bill filed here, (but as this is a removed case, any such objections could have been cured by reforming the pleadings.) Under the facts stated,—and I suppose there is no dispute in regard to them,—the parties are entirely mistaken as to the realty, and if there is any demand for the personalty, that is to be pursued at law.

Demurrer sustained, and bill dismissed.

CENTRAL TRUST CO. v. TEXAS & ST. L. RY. CO.¹*In re* WATERS PIERCE OIL CO., Intervenor.¹*(Circuit Court, E. D. Missouri. April 8, 1885.)*

1. RAILROAD LIENS—OILS—REV. ST. MO. § 3200, CONSTRUED.

Lubricating and illuminating oils are not "materials," within the meaning of section 3200 of the Revised Statutes of Missouri, and parties furnishing them are not entitled to any statutory lien.

2. MORTGAGES—MATERIAL-MEN—EQUITABLE LIENS.

Where materials necessary for use in the management of a railroad were furnished from time to time from October 17, 1882, to January 10, 1884, inclusive, and two notes were given for a part of the amount due therefor, dated, respectively, October 15, 1883, and December 12, 1883, both due four months after date, and the railroad defaulted in the payment of its bonded interest, September 1, 1883, and a receiver was appointed January 12, 1884, and the material-men filed their claim for the whole amount due, and surrendered their notes for cancellation, *held*, that they were only entitled to an equitable lien superior to that of the mortgagees, for the amount due for materials furnished after the railroad company's default.

Exceptions to Master's Report.

The claim of the intervenor in this case is for a balance of \$2,861.91, due it for lubricating and illuminating oils furnished the Texas & St. Louis Railway Company, at various times from October 17, 1882, to January 10, 1884, inclusive. Two promissory notes executed by said railway company, on account of part of said indebtedness, one for \$1,376.76, and dated October 15, 1883, and the other for \$1,844.04, dated December 12, 1883, both payable four months after date,—were surrendered for cancellation. It was conceded that the oils were necessary for use in running the road. Default in the payment of interest took place September 1, 1883. A receiver was appointed January 12, 1884. The intervening petition was filed April 5, 1884. The intervenor claimed a lien under the Missouri Statutes, which provide (Rev. St. § 3200) that "all persons who shall do any work or labor in constructing or improving the road-bed, rolling stock, station-houses, depots, bridges, or culverts of any railroad company incorporated under the laws of this state, or owning or operating a railroad within this state, and all persons who shall furnish ties, fuel, bridges, or materials to such railroad company, shall have * * * a lien," etc. The master reported that the intervenor is not entitled to any lien under said statute, because oils are not materials, within its meaning; but is entitled to an equitable lien for all oils furnished since the railroad company defaulted in the payment of interest.

W. R. Woodward and J. D. Johnson, for intervenor.

Phillips & Stewart, for receiver.

Butler, Stillman & Hubbard and Elenious Smith, for complainant.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

BREWER, J., (*orally.*) In the intervening petition of the Waters Pierce Oil Company, in the case of *Central Trust Co. v. Texas & St. L. Ry. Co.*, the question presented is whether the oils furnished by the intervenor come within the Missouri statute in reference to liens. The language of the statute contains the word "fuel," in addition to the words "labor and material;" and it is claimed that the use of the word "fuel" enlarges the meaning of the word "material," and makes it broad enough to cover all supplies furnished. But for that word "fuel" there would be no question. The idea which underlies these lien statutes is that because the labor and the material have gone into the building of the road or structure, and to that extent added to its value, therefore a lien for such labor and material should be given to him who does the one and furnishes the other.

Now, fuel does not go into the structure of a railroad; neither does coal oil. It is something used in the running of the road; a part of the supplies necessary for the operation of the road, but nothing which goes into the enduring structure. While we may be compelled to follow the language of the statute, and give for the fuel furnished a lien, yet I think in the construction of these statutes we should start from the underlying thought of giving security to him who adds to the value of the road, and that we should never carry the statute beyond that, unless imperatively demanded by the language used; particularly, as Brother TREAT suggests, when it would operate to override prior mortgages. So that, while that word "fuel" is in there, I take it it is not fair to give it the force of enlarging the meaning of the other words, "material," etc., but it should be considered as a new term, something added by the legislature, carrying its own weight, but giving no different meaning to the word "material" from that which it possessed in prior statutes, and, in fact, changing the statutes only in this respect: that it adds a certain specified matter for which a lien is given. The master was correct in his conclusions. The exceptions will be overruled, and the report confirmed.

BLAIR v. ST. LOUIS, H. & K. RY. CO. and others.

In re MERRIWETHER and others, Intervenor.¹

(Circuit Court, E. D. Missouri. April 29, 1885.)

RAILROAD MORTGAGES—LIEN OF MATERIAL-MEN—STATUTE OF FRAUDS.

Where supplies used for rebuilding bridges, building side tracks, and in making repairs, were furnished a railroad company from time to time under a continuous verbal contract made after default in the payment of the company's bonded interest, and which was not terminated until the appointment of a re-

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

ceiver, (more than two years after the first supplies were furnished,) held that, notwithstanding the statute of frauds, the material-men were, under the circumstances, entitled to judgment for the balance due them, and to a lien for the amount due on the earnings of the road, superior to that of the mortgage creditors.

Motion for Rehearing.

For a statement of facts and opinion on exceptions to master's report, see 22 FED. REP. 769.

In *Central Trust Co. v. Texas & St. L. Ry. Co.*, referred to in the opinion, the following order concerning intervening claims was made, viz.:

"That all outstanding debts of the said railway company for labor, materials, and supplies used in the equipment or permanent improvement of the said railroad, and all outstanding debts for necessary operating and managing expenses thereof in the ordinary course of its business, incurred after the first day of September, 1883, shall be allowed by the master as equitable liens, prior in right to the lien of the mortgage sued on, irrespective of statutory liens therefor. And it is further ordered that all such claims accruing on open running accounts between said railroad and its creditors shall be considered as embracing within this order, if any part of the work was done, materials furnished or expenses incurred after the first day of September, 1883, on subsisting contracts necessary for the continued operation of the road by said receiver; otherwise the demand will be limited to what accrued subsequent to said September 1st."

September 1st was the day upon which default took place.

Walter C. Larned and *Theo. G. Case*, for complainants.

John O'Grady, for receiver.

Dyer, Lee & Ellis, for intervenors.

BREWER, J., (*orally*.) The same principle announced concerning the intervening petitions in *Central Trust Co. v. Texas & St. L. Ry. Co.* will determine the case of *Merriwether v. St. Louis, H. & K. Ry. Co.* Some criticism was made in the argument on what was said by Brother TREAT as to the mortgagor being agent of the mortgagee after default in the payment of interest. I do not think my brother TREAT meant to be understood as laying down as a general proposition that wherever there was default the mortgagor became the general agent for the mortgagee for the contraction of debt. Certainly, if he did, I should not feel like agreeing with that view. But that was simply one argument in support of the general conclusion he reached, that in that particular case, there being a subsisting contract for the furnishing of all the lumber on a specified tract, and which had not been all delivered, the mortgagor might be properly treated as authorized by the mortgagee to act as his agent.

The motion for rehearing will be overruled.

v.23F,no.14—45

BURLINGAME v. CENTRAL R. OF MINN.¹

(Circuit Court, E. D. New York. February 24, 1885.)

VERDICT—POWER OF COURT TO CORRECT MISTAKE IN.

Where a jury, in an action for services, returned a verdict for plaintiff for \$3,500; and two days after, while counsel for both parties were present, the court directed the jury to be recalled, and they all, on being asked if that was their verdict, answered that it was not,—that their verdict was for \$3,500, *with interest*,—*held*, that the court had power to cause the mistake to be corrected, and that the plaintiff should have judgment for \$3,500, and interest.

Motion for Judgment on Verdict.

P. W. Ostrander, for plaintiff.

Deforest & Weeks, for defendant.

WHEELER, J. This is an action to recover for personal services rendered while the plaintiff was a director and treasurer of the defendant. The jury was directed to return a verdict for the plaintiff for such services as he rendered, if any, outside the scope of his duties as director and treasurer, at the special request of the president and the rest of the board of directors, and that if they found for the plaintiff they might allow interest from the time when the services were completed. Late in the day they returned a verdict for the plaintiff for \$3,500, and the court was immediately adjourned to the next day. During the next day a statement was made to the court that the jury intended to give a verdict for \$3,500, with interest. On the morning of the next day after that, and on notice to defendant's counsel to be present, and while the counsel for both parties were present, the court directed the jury to be recalled to their places, and that the verdict, as recorded, be read to them, and that they be asked if that was their verdict. This was done, and the foreman answered that it was not; that their verdict was for \$3,500, with interest. They were directed to compute the interest and agree upon the amount, which they did; and answered that it was \$2,038.20, making \$5,538.20, and that their verdict was for the plaintiff for that amount, which was ordered to be recorded, and the jury, being interrogated separately, all said that that was their verdict. At the same time an affidavit of all the jurors was presented and filed, stating that the verdict agreed upon was for the plaintiff for \$3,500, with interest.

The plaintiff now moves for judgment on the verdict for the full amount. The defendant objects to judgment on the verdict for any more than \$3,500, on the ground that interest was not recoverable, and because it was not within the power of the court to allow the verdict to be varied after it had been received and recorded. As the services were rendered on special request, and to be paid for, the pay was due when they were performed, and after that time was detained by the defendant against the right of the plaintiff to have it. Under

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

these circumstances it ought to bear interest. *People v. Gasherie*, 9 Johns. 71; *Wood v. Robbins*, 11 Mass. 504; *Burdett v. Estey*, 19 Blatchf. 1; S. C. 3 FED. REP. 566.

The power of the court to cause the verdict to be corrected would seem to be ample, according to the law of the state of New York, and the practice of its courts, as settled by its highest court. In *Dalrymple v. Williams*, 63 N. Y. 361, the jury returned a verdict against two, when the verdict agreed upon was against one, and in favor of the other, and the verdict was recorded and the jury separated; afterwards, on the same day, on the affidavit of all the jurors, the verdict was corrected and the judgment entered upon it. This course was approved. In *Cogan v. Ebdon*, 1 Burr. 383, where the issue was as to two rights of way under which the defendant justified, the jury found for the defendant as to one, and for the plaintiff as to the other, but returned a verdict for the defendant as to both and separated. This verdict was corrected on the affidavit of the jurors. In this case there is no suspicion of any unfair conduct on the part of the jurors, or any one. It was an honest mistake, which, if not corrected, would prevent the finding of the jury as it actually was from being carried out. The correction is not an impeachment of the verdict by the jurors in any sense. It upholds the real verdict, and prevents miscarriage in its delivery into court. The verdict as first recorded was not the real verdict of the jury. If it could not be corrected, it should be set aside. Neither party has moved for that.

Judgment on verdict for full amount.

SMALL v. MONTGOMERY.¹

(Circuit Court, E. D. Missouri. April 6, 1885.)

JURISDICTION—SERVICE ON NON-RESIDENT ATTENDING AS WITNESS IN ANOTHER CASE.

Where a non-resident, who has come into the district to attend the trial of a case in which he is plaintiff, is detained within the jurisdiction of this court as a witness in another suit, he is not subject to civil service for the institution of suits against him while so detained.

Plea in Abatement and Demurrer to the Evidence.

The plea states that the defendant is a resident of Tennessee, and came into this district to attend the trial of a case in which he was plaintiff, and a necessary witness on his own behalf; that while attending the trial of said case he was served with a subpoena in another case then pending in the St. Louis circuit court, and while attending as a witness in the latter case, in obedience to said subpoena,

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

was served with process in this case. The evidence substantiated the allegations of the plea.

Krum & Jonas, for plaintiff.

Collins & Jamison, for defendant.

TREAT, J., (*orally*.) The question presented by demurrer to the evidence on the plea of abatement, and the reply thereto, in this case, is one on which, after a great difference of opinion, the various circuit courts of the United States have reached a common conclusion,—one in the first circuit, and one in the adjoining circuit, the seventh. Extended commentaries thereon will be found in 21 Amer. Law. Reg. 672. See *Atchison v. Morris*, 11 FED. REP. 582.

The proposition is this: When a party to a suit, a non-resident, appears in a state, in order to represent himself with respect to his interests therein involved, or when one as a witness is brought into a state for that purpose, whether, thus coming within such jurisdiction, he is subject to civil service for the institution of suits against him. I am cited to a recent case in Connecticut, followed by a commentary in another case by Judge SHIPMAN, a United States district judge. An examination of those cases will show that neither the supreme court of Connecticut nor the United States district judge went to the length contended for in this case. All the United States circuit judges who have passed upon the question of late, as well as *dicta* by the supreme court of the United States in respect thereto, reach this result, viz.: that where a party *in good faith* is brought within the jurisdiction of the state or detained therein, being a non-resident, either as party to the suit or as witness in another suit, he is not subject to service. And the reason—the main reason—is very potential, so far as our country is concerned. There are many states, stretching from Maine to Oregon, and a man who is required to go from one to the other, either as a witness or as a party to a suit, should not be pursued by suit while abroad, instead of being sued at his own residence; otherwise, every one, as is stated in many of these opinions, would avoid, as far as possible, being subjected, thousands of miles away, to suits of this character. The result is, the demurrer to the evidence is overruled. Judgment on the plea of abatement in favor of defendant, which abates the case.

KEHLER v. NEW ORLEANS INS. Co.¹

(Circuit Court E. D. Missouri. April 11, 1885.)

1. FIRE INSURANCE—NOTICE TO BROKER.

Where a policy of insurance procured through a broker contained the following conditions, viz.: "If any broker or other person than the assured have procured the policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the *agent of the assured*, and not of this company, in any transaction relating to the insurance. This insurance may be terminated at any time by request of the assured, or by the company, on giving notice to that effect;" *held*, that notice from the company to the broker who procured the policy, of an election to terminate the insurance, was not notice to the assured.

2. PRACTICE—MOTION TO SET ASIDE VERDICT—NEW DEFENSE.

A verdict and judgment thereon will not be set aside upon the ground that the defendant has been prevented, by a mistake, and without fault, from being represented at the trial and making his defense, when the defense which he sets up in affidavits in support of his motion to set aside is entirely new, and not disclosed by the original pleadings.

Motion to Set Aside the Verdict and Judgment.

Suit upon a fire insurance policy taken out by the assured through a broker. The policy contained among its conditions the following:

"If any broker or other person than the assured have procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance. This insurance may be terminated at any time by request of the assured, or by the company, on giving notice to that effect."

The answer contains a general denial, and states that the defendant had terminated the insurance by notice to the plaintiff according to the terms of the policy, before any loss occurred. At the trial it appeared that the defendant had attempted to terminate the insurance before the fire, by giving notice to the broker who procured the policy, but that the plaintiff had received no actual notice of the defendant's desire to terminate the insurance until after the fire occurred.

The defendant was not represented at the trial. The verdict was for the plaintiff. The defendant moved to set aside the verdict, and filed affidavits tending to show that the attorney's absence had been caused by a mistake, and that it had a defense not set up in its answer.

G. M. Stewart, for plaintiff.

Eleneious Smith and *E. H. Gary*, for defendant.

TREAT, J., (*orally*.) In the case of *Kehler v. New Orleans Ins. Co.* there is a motion to set aside verdict and judgment. The original defense to the case was that, under the terms of the policy, it could be canceled on notice given, and that said notice was given before the loss. On the testimony submitted, it appeared the notice was not given. I supposed the contention would be that the broker who negotiated the insurance must be treated as if he were the plaintiff

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

himself, or his agent for receiving notice. He is not so. That question was before the supreme court and decided in the case of *Grace v. Insurance Co.* 109 U. S. 278; S. C. 3 Sup. Ct. Rep. 207. His functions terminated when he effected the policy.

Now, this motion goes a step further. It sets up in the affidavit an entirely new defense, which, it seems, was not thought of before, to-wit, that the policy executed and delivered to the plaintiff was only on condition that the parent company should assent thereto, which it never did. That is something that was not in the original pleadings. The party had abundant opportunity to do that originally. Now he wishes to set up a new defense, and reopen the case upon a theory which is utterly inconsistent with his own correspondence on file.

The motion will be overruled.

MITCHELL v. CATCHINGS.¹

(Circuit Court, E. D. Missouri. April 18, 1885.)

PROMISSORY NOTES—OPTIONS—NOTICE—REASONABLE TIME.

Where a demand note, given as security for a continuing option transaction, but valid on its face, was bought in the regular course of business and for full value, 23 days after date, by one who knew the payees of the note dealt in options, and suspected, but did not know, that it had been taken in some option deal, *held*, (1) that the note had been negotiated within a reasonable time; (2) that the purchaser was a *bona fide* holder without notice.

At Law. Suit on a promissory note.

Hugo Muench, for plaintiff.

Phillips & Stewart, for defendant.

BREWER, J., (*orally*.) In *Mitchell v. Catchings*, action on a note for \$5,000, there is really only one question, and that is whether the plaintiff was a *bona fide* holder, before due, of the note in controversy. In its inception the note was a note given as security for option deals,—a pure gambling transaction,—a note void as between the parties beyond any question. The plaintiff claims to be a *bona fide* holder before due. The note is a demand note, dated November 13th, indorsed to plaintiff, December 6th. No demand was in fact made prior to transfer. While it is true a letter was written by McCormick, of the firm of Smith, McCormick & Co., the payees of the note, yet there was no presentment of the paper to the maker, no demand, within the rules of the law-merchant. Twenty-three days elapsed between the making of the paper and the transfer. Is that such length of time that the court is justified in presuming a demand, and

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

holding that the paper was taken overdue? The books show it is a mixed question of law and fact as to what is reasonable time within which demand must be made. In Daniel, Neg. Ins., quoting, I think, from Pars. Notes & Bills, the author makes use of an expression something like this:

"That it is unquestionable that one day would not be a reasonable time, and that five years would be an unreasonable delay. Intermediate these times there is nothing settled, and each case must be left to be determined upon its own peculiar circumstances."

This note was given as security for a continuing transaction. In the contemplation of the parties it was not to be immediately paid. So the defendant says, and claims really a breach of contract on the part of the payees, in that they closed out his deals more speedily than they were warranted. Hence, as between the parties, it being contemplated that it was to stand as security for a continuing transaction, and not as paper which was to be immediately collected and paid, it does not seem to me that the 23 days can be held to be an unreasonable time. Counsel said in the argument (I do not know whether correctly or not, for I have not had time to examine) that no case can be found in the books in which any period less than 30 days has been held to be an unreasonable time. Applying the law as thus laid down in the books, I cannot hold that the note was transferred after due.

The purchaser suspected that the note was given for one of these gambling contracts. He knew the parties from whom he purchased, and that they were engaged in that kind of business; and so he says he was not blind, but suspected the nature of the transaction. Still, he knew nothing about it. He bought it in the regular course of business at his bank, and paid his money for it. I have a strong feeling in reference to these transactions, (purely gambling transactions,—that is the long and short of it,) and it is a sore temptation to ignore the law laid down by the supreme court, and say that the man who buys under such circumstance does not buy as a *bona fide* purchaser. But the supreme court have held in several cases—and of course that must here be taken as settled law—that mere suspicions or negligence do not invalidate the purchase, or make the purchaser not a *bona fide* purchaser. "There must be [and that is the language of the court] *mala fides*;" and it could hardly be said there was *mala fides* in this case. The note on the face was all right; the plaintiff bought it in the regular course of business and paid his money for it, paying full value; and while, from the knowledge that he possessed of the business in which the payees were engaged, he must have suspected and did suspect the origin of the note, yet he did not know it. I am therefore reluctantly compelled to say that I cannot hold he was guilty of *mala fides* in purchasing the paper; and that, being a *bona fide* purchaser, he is entitled to recover.

BARRY v. UNITED STATES MUTUAL ACCIDENT ASS'N.

(Circuit Court, E. D. Wisconsin. March, 1885.)

1. ACCIDENT INSURANCE—ALLEGED INJURY—QUESTION FOR JURY.

In an action on an accident insurance policy the question whether deceased was injured by jumping from a platform as alleged, is a question of fact for the jury to determine from all the circumstances of the case as shown by the evidence.

2. SAME—"ACCIDENTAL" DEFINED.

The term "accidental" as used in an accident policy is used in its ordinary sense, and means "happening by chance, unexpectedly, or not as expected."

3. SAME—"ACCIDENTAL MEANS" DEFINED.

4. SAME—"EXTERNAL AND VISIBLE SIGNS OF INJURY"—INTERNAL INJURY.

An injury that is internal may afford external indications or evidences, which are visible signs of the injury within the meaning of such term as used in an accident policy.

5. SAME—"SOLE AND PROXIMATE CAUSE OF DEATH."

In an action on an accident policy where it is shown that the deceased sustained an accidental injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the original injury will be considered as the proximate and sole cause of death; but if an independent disease or disorder, not necessarily produced by the injury, supervened upon the injury, or if the alleged injury merely brought into activity a then existing but dormant disorder or disease, and death resulted wholly or in part from such disease, the injury cannot be considered the sole and proximate cause of death.

At Law.

C. M. Bice, for plaintiff.

Finches, Lynde & Miller, for defendant.

DYER, J., (*charging jury*.) On the twenty-third day of June, 1882, the defendant association issued to John S. Barry, then residing at Vulcan, Michigan, but since deceased, what may be termed a contract of insurance, by which it agreed to pay his wife, Theresa A. Barry, a sum not exceeding \$5,000, within 60 days after sufficient proof that, at any time within the continuance of membership of Dr. Barry in the association, he had sustained bodily injuries, effected through external, violent, and accidental means, and that such bodily injuries alone had occasioned death within 90 days from the happening thereof. This is a suit brought by the beneficiary named in the policy to recover the amount of the insurance.

It is alleged that the deceased sustained an injury, within the meaning of the policy, on the twentieth day of June, 1883, and it is proven that he died on the twenty-ninth day of that month. There is no question, therefore, that if he was injured as claimed, he died within the time after the alleged injury named in the policy; nor is there any question that the policy was in force at the time of his death. By the terms of the policy it was provided, as already stated, that to entitle the beneficiary to the sum of \$5,000, the death should be oc-

casioned by bodily injuries alone, effected through external, violent, and accidental means. Also that the benefits of the insurance should not extend to an injury of which there was no external and visible sign; nor to any injury happening, directly or indirectly, in consequence of disease; nor to any death or disability caused wholly or in part by bodily infirmities, or disease existing prior or subsequent to the date of the policy; nor to any case except where the injury was the proximate or sole cause of the disability or death. The issue between the parties may be briefly stated:

It is claimed by the plaintiff that, on the occasion mentioned by Dr. Hirschman, when the deceased was at Iron Mountain, he sustained an injury by jumping from a platform to the ground; that this injury was effected by such means as are mentioned in the policy; that the deceased at the time of the alleged accident was in sound physical condition and in robust health; and that the alleged injury was the proximate and sole cause of death. The defendant denies that the deceased sustained any injury that was effected through accidental means, and also contends that if any injury was sustained, it was one of which there was no external or visible sign, within the meaning of the policy; and that the supposed injury was not the cause of the death of the deceased, but that he died from natural causes. The case therefore resolves itself into three points of inquiry: *First*. Did Dr. Barry sustain internal injury by his jump from the platform on the occasion testified to by Dr. Hirschman? *Second*. If he did sustain injury as alleged, was it effected through external, violent, and accidental means, within the sense and meaning of the policy, and was it an injury of which there was an external and visible sign? *Third*. If he was injured as claimed, was that injury the proximate cause of his death? To entitle the plaintiff to a verdict, each and all of these questions must be answered by you in the affirmative; and if, under the testimony, either one of them must be negatively answered, then your verdict must be for the defendant.

The first question,—viz., was the deceased, Dr. Barry, injured by jumping from the platform,—is so entirely a question of fact to be determined upon the testimony, that the court must submit it without discussion to your determination. In passing upon the question, you will consider all the circumstances of the occurrence as laid before you in the testimony, the apparent previous physical condition of Dr. Barry, the subsequent occurrences and circumstances tending to show the change in his condition, the relation in time which the first developments of any trouble bore to the time when he jumped from the platform, the nature of his last sickness, and the symptoms disclosed in its progress and termination. Further, you will inquire what evidence, if any, did the *post mortem* examination, and any and all subsequent examinations of the parts alleged to have been the seat of the supposed injury, furnish of an actual physical injury; what connection, if any, does there or does there not appear to be between the

act of jumping from the platform and the subsequent events and circumstances which culminated in death, including the result, as you shall find it to be, of *post mortem* investigations. The question is before you, in the light of all proven facts, for determination. The court cannot indicate any opinion upon it without invading your exclusive province, and by your ascertainment of the facts the parties must be bound. There is presented in the case a train of circumstances. Do they, or not, so to speak, form a chain connecting the ultimate result with such a previous cause as is alleged? Was the act of jumping from the platform adequate or inadequate to produce an internal injury? Thus may you properly pursue the inquiry, guided by and keeping within the limits of the testimony.

If you find that injury was sustained, then the next question is, was it effected through external, violent, and accidental means? This is a pivotal point in the case, and therefore vitally important. *The means* must have been external, violent, and accidental. Did an accident occur in the means through which the alleged bodily injury was effected? It does not help you to a proper conclusion to say merely that the injury itself, if there was one, was an accident or accidental. That was the result, and not the means, through which it was effected. The jumping off the platform was the means by which the injury, if any was sustained, was caused. Was there anything accidental, unforeseen, involuntary, unexpected in the act of jumping, from the time the deceased left the platform until he alighted on the ground? The term accidental is here used in its ordinary, popular sense, and in that sense it means "happening by chance, unexpectedly; taking place not according to the usual course of things," or not as expected. In other words, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means. But if in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted from the accident, or through accidental means. We understand from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty. But you must go further and inquire,—and here is the precise point on which the question turns,—was there or not any unexpected or unforeseen or involuntary movement of the body from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was

there or not any involuntary wrenching or turning of the body in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the inquiry in hand; and I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body, as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated, or would naturally anticipate, then any resulting injury was not effected through any accidental means. But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, strain, or wrenching of the body, which brought about the alleged injury; or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted,—then the injury would be attributable to accidental means. Of course it is to be presumed that he expected to reach the ground safely and without injury. Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by chance, or not as expected, happen in the act of jumping or striking the ground, which caused an accident? This, I think, is the test by which you should be governed in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means. You have the testimony in relation to the occurrence which it is claimed by the plaintiff produced in Dr. Barry a mortal injury, and taking it all into consideration, and applying to the facts the instructions of the court, you will determine whether, if any injury was sustained, it was effected through external, violent, and accidental means.

The defendant claims that if Dr. Barry did sustain injury, it was one of which there was no external and visible sign and therefore that the plaintiff is not entitled to recover. In the discussion of this question, counsel were understood to contend that no recovery could be had under a policy in the form and terms of this one, if the injury was wholly internal. In that view, the court cannot concur. It is true, there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. That is not the meaning or construction of this policy. Such an interpretation of the contract as is contended for in that particular, would, in the opinion of the court, sacrifice substance to shadow and convert the contract itself into a snare, an instrument for the destruction of valuable rights. Visible signs of injury, within the meaning of this policy, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidences which are visible signs of internal injury. Complaint of

pain is not a visible sign, because pain you cannot see; complaint of internal soreness is not such a sign, for that you cannot see; but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting and retching, or bloody or unnatural discharges from the bowels; if, in short, it sends forth, to the observation of the eye, in the struggle of nature, any signs of the injury,—then those are external and visible signs, provided they are the direct results of the injury. And with this understanding of the meaning of the policy, and upon the evidence, you will say whether, if Dr. Barry was injured as claimed, there were or were not external and visible signs of the injury; and the determination of this point will involve the consideration of the question, whether what are claimed here to have been external and visible signs were, in fact, produced by—were the result of—the injury, if any was sustained.

The next question is, if Dr. Barry was injured as claimed, was the injury the sole or proximate cause of his death? Interpreting and enforcing the policy according to its letter and spirit, it must be held that if any other cause than the alleged injury produced death there can be no recovery. In short, to entitle the plaintiff to recover, you must be satisfied that the alleged injury was the proximate cause of death. Whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. An efficient, adequate cause being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. If, for example, the deceased sustained injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the death could be properly attributed to the original injury. In other words, if these results followed the injury as its necessary consequence, and would not have taken place had it not been for the injury, then I think the injury could be said to be the proximate or sole cause of death; but if an independent disease or disorder supervened upon the injury, if there was an injury,—I mean a disease or derangement of parts not necessarily produced by the injury,—or if the alleged injury merely brought into activity a then existing but dormant disorder or disease, and the death of the deceased resulted wholly or in part from such disease, then it could not be said that the injury was the sole or proximate cause of death.

It is claimed by the plaintiff that the supposed jar or shock said to have been produced by jumping from the platform, caused some displacement in the *duodenum*; that it became occluded; that there was constriction and occlusion of that intestine, which was accompanied with consequent inflammation. In short, that the deceased had *duodenitis* as the direct result of the alleged original injury, and, in con-

sequence, died. This contention is urged upon all the circumstances of the case, and upon the testimony offered by the plaintiff tending to show the symptoms which accompanied the last sickness, the diagnosis of the case made by attending physicians, and the alleged developments of the autopsy. It is contended in behalf of the defendant that there was no constriction, occlusion, or inflammation of the *duodenum*, that the deceased did not have *duodenitis*, and that no physical injury is shown to have resulted from jumping from the platform. This claim is based upon the contention that the various symptoms manifested in the last sickness of the deceased were consistent with natural causes,—with some undiscovered organic trouble, not occasioned by violence or sudden injury; that the conclusions of the physicians who made the *post mortem* examination were erroneous; and that the microscopic examination of the parts in New York demonstrated such alleged error. Concerning the microscopic test made in New York by Dr. Carpenter, the plaintiff contends that it is not reliable and should not be accepted for reasons urged in argument, and which I need not repeat.

Now, between these conflicting claims, weighing and giving due consideration to all the testimony, you must judge. If the deceased died of some disease or disorder not necessarily resulting from the original injury, if there was an injury, then the defendant is not liable under this policy; but if the deceased received an internal injury which, in direct course produced *duodenitis*, and thereby caused his death, then the injury was the proximate cause of death.

Since the plaintiff has alleged in his complaint and claims that the deceased received an injury in the *duodenum*, I am asked by the defendant's counsel to instruct you that if the deceased did not die of *duodenitis*, or if you should find that the alleged jump did not produce or result in a stricture of the *duodenum*, then your verdict should be for the defendant. This instruction I must decline to give, for my opinion is that if the deceased sustained internal injury in any part of his body, of which there was an external and visible sign, and if that injury was effected through the means named in the policy, and if such injury was the sole or proximate cause of death, then the plaintiff is entitled to recover.

As I once had occasion to observe in a case somewhat similar in general character to this, you ought not to adopt theories without proof, nor to substitute bare possibilities for positive evidence of facts testified to by credible witnesses. Mere possibilities, conjectures, or theories should not be allowed to take the place of evidence. Where the weight of credible testimony proves the existence of a fact, it should be accepted as a fact in the case. Where, if at all, proof is wanting, and the deficiency remains throughout the case, the allegation of fact should be deemed not established.

Now, to briefly sum up the case: If you find from the evidence that the deceased, on the twentieth day of June, 1883, sustained a

bodily injury, and that such injury was effected through external, violent, and accidental means, and was one of which there was an external and visible sign, and that the injury was the proximate or sole cause of death, then the plaintiff should have a verdict in her favor. If, on the contrary, you find either that the injury was not sustained, or that, if it was sustained, it was not effected through external, violent, and accidental means, or was an injury of which there was no external or visible sign, or that it was not the proximate or sole cause of death, then your verdict should be for the defendant.

NOTE.—The cases cited by counsel, and considered by the court on the trial of this case, were *Whitehouse v. Travelers' Ins. Co.* 7 Ins. Law J. 23; *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574; *N. A. Life & Acc. Ins. Co. v. Burroughs*, 69 Pa. St. 43; and *McCarthy v. Travelers' Ins. Co.* 8 Ins. Law J. 208.

GENTRY and others v. SUPREME LODGE, KNIGHTS OF HONOR.

(Circuit Court, D. Indiana. April 7, 1885.)

LIFE INSURANCE—KNIGHTS OF HONOR—CHANGING APPOINTMENT OF BENEFICIARY.

A party to whom a benefit certificate has been issued by the order of the Knights of Honor may revoke the appointment of the beneficiary named therein, and appoint a new beneficiary, to whom the benefit will be payable on his death, "in good standing."

At Law.

J. E. Williams, for plaintiffs.

James O. Pierce, for defendant.

WOODS, J. The plaintiffs sue upon a benefit certificate issued by the order of the Knights of Honor, in 1877, to John P. Gentry, in which it was stipulated that the sum of \$2,000 should, upon his death, in good standing, be paid to "such person or persons as he might direct," and upon the margin of which certificate he directed that said sum should be paid to his wife and children, who are the present plaintiffs.

Defendants' answer sets up the charter of the defendant corporation, granted by the legislature of Kentucky, and the constitutions and by-laws adopted by the order, and shows that the privilege was reserved to Gentry, not only to nominate a beneficiary, but to revoke said nomination and change the beneficiary at pleasure; that previous to his death, in 1881, he exercised this privilege, surrendered the benefit certificate now sued on, and applied for a new one, which was issued to him, and in which he directed that his benefit be paid to Mrs. Minnie L. Jones, a creditor and not a relative; and that upon the death of said Gentry, the defendant paid the said sum of \$2,000 to said Mrs. Jones. The demurrer filed by plaintiffs to this answer raises the question of the sufficiency of this defense.

Plaintiffs' counsel relies upon the grant of power in defendant's charter to establish a widows' and orphans' benefit fund, from which, in case of the death of a member who has complied with all its lawful requirements, "a sum not exceeding \$5,000 shall be paid to his family, or as he may direct." It is insisted that this clause of the charter establishes the family of the member, who at his death may fall in the category of "widows and orphans," as a class to which the member is limited in designating his beneficiary. The question has been several times decided by other courts, under this and similar charters or constitutions, and it has been held that the words "or as he may direct," or others of similar import, confer upon the member a general power of designating as beneficiary any person or persons whom he may choose. In the opinion of the court, this must be regarded as the correct rule for the present case.

The defendant's charter was so construed in the following-named cases, in which certificates of membership were involved, in terms substantially the same as the one now before the court: *Highland v. Highland*, 16 Chi. Leg. News, (Ill.) 272; *Tennessee Lodge v. Ladd*, 5 Lea, 716; *Supreme Lodge v. Martin*, 12 Ins. Law J. 628.

For cases in which the unlimited right to change the beneficiary has been conceded to the members of other mutual benefit societies, see *Durian v. Central Verein*, 7 Daly, 163; *Swift v. Conductors' Ass'n* 96 Ill. 309; *Splawn v. Chew*, 60 Tex. 532; *Hellenberg v. I. O. B. B.* 94 N. Y. 580; *Relief Ass'n v. McAuley*, 2 Mackey, 70.

It is urged that the courts of Kentucky, in which state the defendant was incorporated, have taken a different view of the question. It appears, however, that there is no real conflict of authority. The Kentucky cases in which it has been held that the member's power of appointment is limited to his family, or to some portion thereof, as a class, are cases in which such a limitation was found in the charter. *Masonic Ins. Co. v. Miller's Adm'r*, 13 Bush, 489; *Weisert v. Muehl*, 5 Ky. Law Rep. 285; *Hallan v. Gardner*, Id. 857. But the court of appeals of Kentucky, while so deciding, recognizes the principle that in these mutual benefit societies, the member may have as broad a range of choice in selecting his beneficiary as the organic law of his society gives him. *Van Bibber's Adm'r v. Van Bibber*, 14 Ins. Law J. 290; *Duwall v. Goodson*, 79 Ky. 224.

It results that the appointment of the plaintiffs as beneficiaries under the original certificate issued to Gentry was subject to revocation by him, and that the appointment of a new beneficiary and the payment of the fund to her did not violate any right of the plaintiffs.

The plaintiffs electing to offer no reply to the defendant's answer, defendant is entitled to a judgment in its favor on the answer.

CLEVELAND ROLLING-MILL Co. v. TEXAS & ST. L. RY. Co.

(Circuit Court, E. D. Missouri. April 27, 1885.)

PRACTICE—ORDER TO FURNISH LIST OF STOCKHOLDERS—REV. ST. MO. § 737.

Where a creditor of a corporation has obtained judgment and had execution issued against it, and the execution has been returned *nulla bona*, without any demand having been made upon the officer in charge of the company's books, for a list of the names, places of residence, etc., of the stockholders liable for unpaid balances upon their stock, this court will not make a peremptory order on such officer to furnish such list.

At Law.

Fisher & Rowell and Ira C. Terry, for plaintiff.

Phillips & Stewart, for defendant.

Dyer, Lee & Elles, Broadhead & Haeussler, and Boyle, Adams & McKeighan, for stockholders.

TREAT, J. On application of plaintiff for peremptory order on J. W. Paramore and A. C. Stewart, respectively president and secretary of defendant company, to furnish a list of the names, etc., of stockholders. It appears from the records in the case that no demand had been made by the marshal, holding the execution, for such list. There is a recital to that effect in the application of February 13th, last, for a rule on the respondents, but there is no return on record thereof. Since the argument on this motion and evidence submitted, a return of the execution *nulla bona* has been filed. The argument before the court proceeded to a large extent as if no such return had been made. It now appears that execution was duly issued; and indorsed thereon is a return of *nulla bona*, January 12th, last, not filed, however, until the twenty-fourth inst. By the statutes, it was necessary, as preliminary to the summary proceedings contemplated against stockholders, that execution should have issued, and an order of court had against the stockholders, respectively, etc.

Section 737, Rev. St. Mo., requires "the clerk or other officer having charge of the books of any corporation, on demand of any officer holding any execution against the same, shall furnish the officer with the names," etc. From the record, the officer holding the execution in this case never made the demand authorized upon either of the respondents. This proceeding is based upon the fact of such demand and refusal to comply therewith. As no such demand is shown, the rule must be discharged. The evidence sufficiently discloses that, under the requirements of law, custody of the stock-book is subject to the control and in charge, lawfully, of the respondents. Hence, if the demand had been made by the marshal when holding the execution, and they had failed or refused to comply therewith, a peremptory order against them would be granted.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

As heretofore stated, the plaintiff had no right to institute these proceedings in the nature of a *mandamus* until a legal demand had been made by the marshal. The rule is discharged.

UNITED STATES v. BAYAUD and another.

(Circuit Court, S. D. New York. January 22, 1883.)

CRIMINAL LAW AND PROCEDURE—PLEA OF GUILTY—INDUCEMENTS HELD OUT BY DISTRICT ATTORNEY—MOTION TO WITHDRAW PLEA.

On examination of the facts in this case, *held*, that motion on the part of the defendants for leave to withdraw their plea of guilty as indicted should not be granted.

Motion to Withdraw Plea of Guilty.

W. P. Fiero, for the United States.

Benj. F. Tracy, for defendants.

BENEDICT, J. This is a motion on the part of the prisoners above named for leave to withdraw a plea of guilty made by them on the fifteenth of December last, or for a postponement of sentence until a future day. The ground upon which leave to withdraw the plea is asked, is that the prisoners were induced to make it by an assurance on the part of the district attorney in respect to his official action, which has not been fulfilled. It appears that at the October term, 1882, four indictments were found against the prisoners for violations of the internal revenue laws. Two of these indictments were thereafter consolidated by the order of the court. At the December term the cases were upon the calendar for trial, and the government was ready to proceed with a large number of witnesses, whereupon the prisoners asked and obtained leave to file a plea of guilty to the consolidated indictments, and such plea was duly entered. This action on their part was taken upon the advice of intelligent and faithful counsel, who had represented them in this matter from the beginning. Before the entry of the plea of guilty it was understood between the counsel for the prisoners and the district attorney, that, in case the defendants should plead guilty to the consolidated indictments, the district attorney would enter a *nolle prosequi* upon the other two indictments, and would not move sentence upon the consolidated indictments until the prisoners had an opportunity to make an effort to effect a compromise of their case at Washington. In pursuance of this understanding the plea in question was duly entered, and the district attorney delayed moving for sentence until the January term, and until he had been officially informed by the commissioner of internal revenue that the prisoner's offer of compromise had been finally rejected, and that no other offer of a compromise would be entertained.

He now moves for sentence, and the prisoners move for leave to withdraw their plea of guilty.

This application is made in behalf of the prisoners by other counsel than the advisers of the plea, and there is no suggestion from those advisers that they have changed their opinion in regard to the truth of the plea, or that the plea was made under any misapprehension or mistake, or that it was procured by the district attorney or any other person; but it is said by one of the advisers of the plea that the defendants, when making the plea, were advised by their counsel that a compromise of the case would be likely to be effected with the department at Washington. The district attorney swears that he never invited the defendants, either directly or indirectly, through their counsel or through any person whatever, to make a plea of guilty, and that the suggestion of such a plea came to him from the defendants' counsel, without suggestion, promise, or inducement by him.

These are all the material facts disclosed by the affidavits that have been submitted upon this motion. The affidavits do, however, disclose, in addition, that the prisoners, in pleading guilty, acted under the belief that they would be able to effect a compromise of the case at Washington; but there is nothing to show that they were encouraged in that belief by the district attorney, whose actions in the premises were confined to those above stated. Upon these facts it has been stoutly contended that it is the duty of the court to permit a withdrawal of the plea. Two grounds for this contention are stated: *First*, that the district attorney has failed to carry out the understanding had, by omitting to enter a *nolle* as to the other two indictments. To this the answer is that the district attorney announces his readiness to *nolle* those indictments if the plea of guilty stands, and the authority of the court to regulate and control criminal prosecutions before it is sufficient to compel a withdrawal of these indictments in case of a failure on the part of the district attorney to make good his announcement. *State v. Graham*, 25 Int. Rev. Rec. 145. The remaining ground of the contention in behalf of the prisoners is that they were induced to make the plea by the hope of benefit to accrue to them thereafter in their effort to effect a compromise with the department, and by the promise of the district attorney to *nolle* the other indictments. The practice of courts in regard to the plea of guilty is never to receive such a plea when there is probable ground to believe that it is the result of menace or duress, or proceeds from weakness, fear, or ignorance. But no case has been cited, nor has any been found, where the discretion of the court has been exercised to permit the withdrawal of a plea of guilty made under the circumstances of this case. Here the prisoners are intelligent men, charged with defrauding the revenue, fully aware of the nature of the charges against them, and of the meaning and effect of their plea of guilty. They made this plea deliberately, understand-

ing that sentence would follow in case they failed to effect a compromise with the department; and in making it they acted under the advice of intelligent and faithful counsel, who now make no claim of mistake or misapprehension either on their part or on the part of the prisoners.

It is not pretended that the district attorney represented to the prisoners that a plea of guilty would aid their application for a compromise, nor do they state any facts calculated to create a belief that their confession is untrue, but content themselves with saying that they are not guilty. As between their statement in their plea that they are guilty, and their present statement that they are not guilty, the circumstances under which the two statements were made justify the conclusion that the plea is true and their present statement untrue. The careful counsel who advised the prisoners to make the plea express no doubt of its truth. When the plea was made, the prisoners stood face to face with the prosecuting officer then ready to try them, with a large array of witnesses in attendance, gathered from distant points, at much expense, but there was no menace, duress, or influence brought to bear upon them by him. On the contrary, they proposed the course that was taken. By confessing their guilt and entering their confession of record in the form of a plea of guilty they induced the district attorney to consent to *nolle* the other indictments, and to afford them an opportunity to urge a compromise before the department. And now, because the district attorney yielded to their proposition, they claim the right to withdraw their confession and compel the government to reassemble the witnesses and prove their guilt. To permit such a proceeding would, in my opinion, give sanction to an abuse of the forms of law. There was no impropriety on the part of the district attorney in giving his promise to *nolle* the other indictments, nor did his promise so to do afford inducement to the plea of guilty of such a character as to make it proper for the court to refuse to receive it; and the prisoners would have had good cause of complaint if, upon this ground, the court had rejected their plea when tendered, and compelled a trial of the indictments before the jury. If, upon the facts, it was incumbent upon the court to receive the plea, it is equally incumbent upon the court not to permit its withdrawal at a subsequent term, after the witnesses have been scattered, and the ability of the government to prove its case has been thereby impaired. Neither was there any undue influence on the part of the district attorney because of his promise to delay moving sentence, in order to afford the prisoners an opportunity to compromise the case. The statute (Rev. St. § 3229) permits a compromise of criminal cases of this character to be made by the commissioner of internal revenue, and, while any considerable lapse of time between conviction and sentence is not favored by the court, an agreement to give the prisoners reasonable delay, in order that, if so advised, they might endeavor to effect a compromise with

the department, is far from being an inducement of such a character as will justify the court's permitting the withdrawal of a plea of guilty made as this one was made. I find, therefore, no ground upon which to justify granting the prisoners' permission to withdraw their plea of guilty. As to the remainder of the application, namely, a further postponement of sentence, to enable the prisoners to renew their efforts with the department to obtain a compromise, the official announcement of the department that no further application for compromise will be entertained shows that further delay would be of no avail.

The motion is accordingly denied.

OSMER v. J. B. SICKLES SADDLERY Co.¹

(Circuit Court, E. D. Missouri. May 18, 1885.)

PATENTS—HORSE-COLLARS.

Letters patent No. 157,367, issued to John M. Bright, for an "improvement in horse-collars," held not infringed by a sweat-cloth, composed of a series of detachable sections.

In Equity.

Paul Bakewell, for complainant.

W. B. Homer, for respondent.

TREAT, J. The Bright patent, No. 157,367, December 1, 1874, is for "a horse-collar consisting of a frame, combined with a number of detachable pads," as described therein. Defendant alleges that the same was anticipated by the Meyer patent, No. 61,016, January 8, 1867, and the Lovett & Lefevre patent, No. 133,786, December 10, 1872. In the light of the said anticipatory patents, it is more than doubtful whether the Bright patent contained any novelty of invention patentable under the law, unless rigidity of frame and consequent absence of hames, were essential. However that may be, it is apparent from whatever construction may be put on the Bright patent that the defendant does not infringe the same, as the Bright patent is for a "horse-collar with detachable pads" arranged as in his patent described. It would seem that his patent was for a collar adjusted, as by him specified, without reference to hames. Separable pads were provided for by the Meyer and Lovette patents, and consequently in the state of the art there was no room open for invention unless the Bright patent was designed for a collar to which, in the absence of hames, separable pads might be attached by buckles and straps, thereby obviating the use of hames, and producing a new

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

collar with pads. This proposition is not urged, because the defendant uses no such collar.

The contention on the part of the plaintiff, in order to succeed, must cover all use of detachable pads, or sweat-cloths with detachable pads, made so as to relieve sore or gall spots on the neck. Such was not the scope of the Bright patent, or if it had been, could he, within the rules of the patent law, have blocked the pathway for all contrivances, whereby such beneficial results could be effected? He must be held to his special device in connection with a horse-collar, as by him stated. The defendant does not sell any such horse-collar, but only sweat-cloths independent of the collar, more like the Meyer and Lovett patents, though not exactly the same as either. Hence, without formally deciding that the Bright patent is void for want of novelty and patentability, it must suffice that under no construction of the Bright patent can the defendant be held to have infringed the same.

Bill dismissed with costs.

THE E. LUCKENBACK.¹

(Circuit Court, E. D. New York. July 2, 1884.)

TUG WITH DREDGE IN TOW—NEGLIGENCE IN STARTING SUDDENLY.

See head-note to same case in the district court, 15 FED. REP. 924. The decision of the the district court in the same case affirmed.

In Admiralty.

Goodrich, Deady & Platt, for libelants and appellees.

Butler, Stillman & Hubbard, for claimants and appellants.

In this case the court (BLATCHFORD, Justice) made and filed the following findings of fact:

On or about the twenty-third of March, 1882, the libelants, being desirous of sending the dredge Brooklyn and ninescows from New York to Fall river, employed the steam-tugs Cyclops and Edith Beard (the latter being owned by the libelants) to tow them to that place. On the twenty-fourth of March, 1882, the Cyclops became disabled by an accident, and the tow was taken into New London, and the tug E. Luckenback was employed by the libelants to continue the towage to Fall river with the Edith Beard. The E. Luckenback arrived at New London about half past 3 o'clock in the afternoon of the twenty-eighth of March, 1882. The dredge was about 65 feet in length and 33 feet in width. Her original width had been 27 feet, and she had been widened by pontoons, 3 feet in width being built on each side of her, her whole length. She was of the same width her whole length, and drew, as she was loaded, over 4 feet. At her stern as she was towed the timbers did not extend from side to side, but the pontoons were extensions, fastened to the side of the dredge without through timbers. In the extreme outer corner of each pontoon a post

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

of yellow pine, 18 inches square, was set. The side timbers and planking, and the stern timbers and planking, were properly secured into the corner posts. The corner posts projected above the deck of the dredge. The construction of the dredge was not unusual or improper, and the dredge was capable of standing all the usual risks and dangers of such a trip, both generally and in respect to the corner posts and the use to which they were put on the occasion.

In the dredge were an engine and boiler and machinery for dredging. The scows were from 50 to 60 feet in length, and were chiefly light. When the E. Luckenback arrived at New London she found the tow already made up. It had been made up by the libelants in such a way that at sea the dredge would be towed ahead of the scows, and the scows would ride in single file behind her. From each of the corner posts of the dredge, which, as she was towed, were on her after corners, a line ran to the forward part of the first scow behind. These lines were about 60 feet in length, and similar lines were run from each scow to the next succeeding scow. The E. Luckenback took the dredge and scows in tow by putting out a hawser, which belonged to the E. Luckenback, of about 100 fathoms in length, to the starboard bitts on the forward end of the dredge, and running a bridle from that hawser to the port bitts of the dredge. The hawser was parceled where the bridle crossed it, and the mode of towage was usual and proper. The Edith Beard made fast along-side of the dredge, and there assisted in the towage, leaving her position from time to time for the purpose of keeping the scows in line and transferring men, and lengthening the lines running from scow to scow.

The tow left New London about 4 o'clock P. M., and proceeded without accident towards Fall River until midnight. It had then arrived at a place off Point Judith. Two days before there had been a strong southerly and easterly gale, which had raised heavy seas. This gale had been followed by a shore wind from the north, which had flattened the sea, but left a long roll. The sea was sufficiently heavy to put the strength of the dredge to the proof, and demonstrate its ability to endure any strain to which it could be properly subjected on the occasion in question. The speed which the E. Luckenback made with her tow was not over three miles an hour. While so proceeding, the hawser between the tug and the dredge chafed and parted. New hawsers were put out from the stern of the tug to each of the forward corners of the dredge, and the tug thereupon started ahead suddenly, and too fast, whereby the scows, which had drifted into great confusion on the port side of the dredge, were rapidly and violently swung astern, and pulled out the rear corner post of the dredge,—being the left-hand or in-shore one, as she was towed,—so that she sank and became a total loss, one man of her crew being drowned. The damage occurred through such negligence of the tug, and without the fault of the libelants. The amount of the damage is that reported by the commissioner in the district court.

On the foregoing facts I find, as conclusions of law, that the tug is responsible for the damage, and that the libelants are entitled to a decree for \$13,-210.35, with interest from March 28, 1882, and their costs in the district court, taxed at \$771.05, and their costs in this court to be taxed.

Accompanying the foregoing findings was the following opinion:

BLATCHFORD, Justice. The reasonings and views and conclusions of the district judge in his opinion are satisfactory to me, and nothing is needed to add to their force. The new evidence on appeal does not furnish ground for a different result. The damages fixed in the district court seem to be proper.

ADDICKS v. THREE HUNDRED AND FIFTY-FOUR TONS CRUDE KAINIT.¹THE CARL.¹

(District Court, S. D. New York. March 22, 1885.)

1. DEMURRAGE—CUSTOM—DISCHARGE INTO LIGHTERS—FALSE NOTICE—REASONABLE DILIGENCE.

It is the usage in the port of New York for ships loaded with kainit to discharge into lighters. Under this usage it is the ship's duty to wait for lighters a reasonable time before discharging on the dock. The master of the ship *Cleopatra*, loaded with kainit, sent word to the consignees on January 11th that the ship was at the dock ready to discharge, and requested lighters to be sent at once. She did not reach the dock till the morning of the 12th, which was Saturday. No lighter was sent till the 15th. The ship claimed demurrage for the 12th and the 14th. The consignees claimed that she was discharged in a reasonable time. *Held*, that false notice of readiness to discharge was no notice, and therefore the ship was not entitled to demurrage for the 12th. But the notice was sufficient to have enabled the consignees to have a lighter alongside on the 14th, and therefore the ship was entitled to demurrage for that day. *Held, also*, that, under the usage to discharge into lighters, the ship had a right to demand that lighters shall be brought along-side with reasonable diligence, and to receive aboard as fast as the ship can deliver, in the absence of special circumstances preventing; no fixed rate of tons per day being obligatory.

2. SAME—DISCHARGE ON DOCK IN ABSENCE OF LIGHTER—LIABILITY THEREFOR—CUSTOM.

The ship *Carl*, loaded with kainit, began to discharge into lighters. Having filled one lighter at 12 M., and no other being then along-side, she began at 2 P. M. to discharge on the dock. Another lighter came the next morning. *Held* that, in view of the absence of any fixed usage to discharge a particular number of tons per day, the ship had no right to begin to discharge on the dock without reasonable and timely notice of her intention; and that the slight delay in the coming of the second lighter did not justify the *Carl* in discharging on the dock; and that the consignee was entitled to recover the extra expense thereby occasioned him.

Demurrage.

Hill, Wing & Shoudy, and *H. Putnam*, for libelants.*Wilcox, Adams & Macklin*, for claimants.

Brown, J. The libellant, Addicks, claims two days' demurrage for the detention of the ship *Cleopatra*, during Saturday and Monday, January 12, and 14, 1884, in discharging some kainit, part of the cargo of the ship. The ship arrived in New York on the seventh of January, loaded with petroleum barrels above, and kainit (resembling salt) below. The ship was required by the charter to go to two different wharves to discharge. The bills of lading required each consignee, upon arrival of the ship, to give immediate notice of the dock to which she should go, in order to deliver their respective portions of the cargo. The claimant, accordingly, whose cargo was at the bottom, gave no-

¹These were two distinct cases, but as the principles involved were similar, and the same proctors appeared in both cases, only one opinion was written. In each case there was delay in getting lighters along-side vessels which were ready to discharge. The *Cleopatra* waited for the lighters before discharging, and then libeled the cargo for demurrage. The *Carl* did not wait for the lighters, but discharged on the dock, and was libeled for the extra expense occasioned thereby.

tice on the 8th, the day after her arrival, that the ship should go to Merchants' stores. The evidence shows that the custom of the port is for kainit to be discharged in lighters, or in schooners, along-side the ship, except occasionally when it is directed to be put on the dock in order to be stored. This usage has grown out of the commercial necessity arising from the fact that kainit is perishable cargo, needing protection from rain, snow, and dampness; and also because it is cheap for its bulk and weight, necessitating economy in handling. A discharge into lighters or schooners subserves these ends. The correspondence of the parties shows that it was understood in this case that the kainit was to be discharged along-side into lighters, as customary. On Friday, the 11th, the claimants received notice from the captain, and also from the ship's agents, that the ship was ready to discharge at Merchants' stores, and they requested lighters at once. On sending to the place of discharge the respondents found that the ship had not arrived there. The next morning, (the 12th,) at a little before 9 o'clock, an agent of the claimants again went to Merchants' stores, and found that the ship still had not arrived. Two letters subsequently passed between the claimants and the ship's agents on the same day; the one complaining of false notices, and the other assuring the claimants that the ship was then actually at Merchants' stores. On further inquiry this was found to be the fact. She arrived there between 9 and 10 on Saturday, the 12th. No schooner was sent by the claimants along-side until Tuesday morning, the 15th, when the discharge was immediately commenced, and completed on the 18th, at 3 p. m. The libellant claims demurrage for two days, the 12th and the 14th. The claimants contend that the ship was discharged within a reasonable time, and that no demurrage can be justly allowed.

1. The time and mode of discharge, not being provided for by the bill of lading, must be governed by the usages of the port, the agreement of the parties, or the rule of reasonable diligence. The usage to deliver kainit into lighters or schooners along-side is, in this case, so clearly proved, except when specially directed otherwise for the purposes of storage, as to form one of the obligations of the ship that she could not disregard without justifiable cause. The mere absence of lighters at the moment the ship arrives at her dock, furnishes, therefore, no warrant for an immediate discharge of the cargo upon the wharf. Her obligation to discharge according to the established usage of the port is an implied part of her contract. In such a case she cannot, at her master's option, discharge upon the dock, except upon the refusal of the consignee to receive, or upon such unreasonable delay as is tantamount to a refusal; and if for such a cause the vessel does discharge upon the dock, she does it under the general authority of the master, who is bound in such a case to make provision for the safety of the cargo, and to give due notice to the consignee. For any ordinary detention through want of lighters she must look

to the consignee and the cargo for damages in the nature of demurrage. In the case of the *Carl*, the delay of a few hours in getting a second schooner along-side was no such delay as warranted the ship to begin to discharge on the dock; and the extra expense caused thereby must therefore be borne by the ship. *The Mary E. Taber*, 1 Ben. 105.

2. The evidence is not sufficient to establish any definite custom or usage, as between the ship and the lighters, in respect to the number of tons of kainit that shall be discharged per day; or any fixed time within which such a cargo must be unloaded. The only rule, therefore, that can be applied, in the absence of any provision on that point in the bill of lading, is that of reasonable diligence. To require of the consignee more than this, would be to allow to the ship all the benefits of a contract for "quick dispatch," when the bill of lading contains no such stipulation. *Fish v. One Hundred and Fifty Tons Brown Stone*, 20 FED. REP. 202, 203; *One Hundred and Seventy-five Tons of Coal*, 9 Ben. 400, 402; *Coombs v. Nolan*, 7 Ben. 301; *Henley v. Brooklyn, etc.*, 8 Ben. 471.

The obligation to use reasonable diligence applies equally in providing lighters or schooners for the receipt of the cargo according to custom, and to the rate of discharge after the lighters are along-side. In receiving the cargo there is little to be done on board the lighter or schooner except to trim the cargo as taken aboard,—usually a very slight labor. The chief work in such a mode of discharge is upon the discharging vessel, and the amount that may be discharged depends upon a variety of circumstances; such as the number of men and horses employed; whether the crew, or stevedores, are used; and upon the condition of the cargo, whether loose, or, as sometimes happens, so caked as to require to be dug out with a pick. Practically, therefore, the rate of discharge depends upon the discharging ship, and it would be an unreasonable rule that should limit the ship as to the amount that she might discharge per day, when all that she could discharge might, without any inconvenience to the lighter or schooner, be received by the latter. The evidence before me in this case, as well as in other cases, shows that, with an ordinary complement of men and one horse, from 60 to 70 tons will usually be discharged per day; with additional men and two horses, from 100 to 150 tons, though the latter is very rarely reached. The rule adopted by the maritime exchange, of 60 tons per day for cargoes of salt, iron, and sulphur, represents very nearly an ordinary single team's work. It is but reasonable diligence, however, on the part of the lighter in such cases to receive whatever the ship can offer. The ship may, therefore, rightfully demand of the lighter, while along-side, that she shall receive as fast as the ship can deliver, unless there be some special circumstances, such as ice, for instance, to interrupt the usual changes in the lighter's position; and such, from the testimony of several witnesses, it would seem, has been the practice. I cannot sustain, there-

fore, the contention that any fixed number of tons per day shall be taken as an average by which to determine what is reasonable diligence in receiving the cargo, as respects the whole period from the time the ship is ready to discharge.

In procuring lighters the consignee of part of a cargo is bound to reasonable diligence only. *Higgins v. U. S. Mail, etc.*, 3 Blatchf. 282; *Coombs v. Nolan*, 7 Ben. 301; *Henley v. Brooklyn, etc.*, 8 Ben. 471; S. C. 14 Blatchf. 522; *Finney v. Grand Trunk, etc.*, 14 FED. REP. 171. He is entitled to reasonable notice (which, by the usual custom, is at least 24 hours) of the time when the ship will be ready to discharge, in order to make his arrangements to have a lighter or schooner alongside. After this, he should have additional lighters on hand for the use of the discharging ship without delay, unless the absence of lighters is further excused by reasonable cause. Since a considerable difference, however, may exist in the rate of the ship's discharge, dependent entirely on her own option, it is clear that if additional lighters are required, a slight delay in bringing a second lighter alongside, owing to a rapid discharge by the ship, cannot be deemed negligence in the consignee unless timely notice is given; and where inability to furnish lighters without delay is proved, notwithstanding the exercise of all reasonable diligence to obtain them, the ship has no claim, in the absence of any specified lay days, and where, as in this case, there is no custom nor stipulation fixing the rate of discharge. *Postlethwaite v. Freeland*, 5 App. Cas. 599, and *Coombs v. Nolan, supra*.

The false notice given on the 11th I must treat as no notice, and therefore exclude any claim for the 12th. The notice was sufficient to require the claimants to have a lighter or schooner alongside on Monday, the 14th, and the evidence does not show a sufficient legal excuse for one not being sent there by that time. If the Fannie Brown, on which the libelants relied to take this kainit, was free on Saturday the 12th, there is no sufficient reason why she should not have proceeded at once to take the Cleopatra's cargo; and if she was blocked up on Saturday, there was sufficient time for the claimants either to have got her clear, or to have procured another schooner for Monday morning. In the case of Addicks, therefore, I hold the libelants entitled to one day's demurrage, for which a decree may be entered with costs; in the case of *The Carl*, the libellant is entitled to \$65, with interest and costs.

THE SHADY SIDE.¹THE MORRISANIA.¹

(District Court, E. D. New York. November 13, 1884.)

1. WHARFAGE—STATE STATUTE—DEMAND—DOUBLE WHARFAGE.

The statute of the state of New York (Laws 1877, c. 315) provides that double wharfage may be recovered by a wharfinger from a vessel which leaves the pier without paying wharfage. *Held*, that to entitle the wharfinger to such double wharfage under that statute, there must be proof of a demand of single wharfage before the vessel departs from the pier, though the statute does not require the demand to be made at the vessel.

2. SAME—STATUTORY LIEN—LIMITATION.

A lien created by a state statute, which fixes no limit of time within which the lien must be enforced, is not lost by delay.

3. SAME—PLEADING—LACHES.

The defense that a lien has been lost by laches, if not pleaded, must be excluded. The decision in *The Francesca T. 9 Ben. 34*, modified.

In Admiralty.

A. & C. Van Santvoord, for libellant.

T. C. Cronin, for claimant.

BENEDICT, J. These actions, which were tried together, are to enforce a lien upon the vessels proceeded against respectively for wharfage.

One question presented is whether the libellant is entitled to recover wharfage at double rates by virtue of the law of the state, (chapter 315, Laws 1877,) notwithstanding the conceded fact that no demand for the single wharfage due was made prior to the vessels' leaving the wharf. Upon this question this court is asked to reconsider the opinion expressed in the case of *The Francesca T. 9 Ben. 34*, where it was said that a demand of the single wharfage due, made of the owner, consignee, or a person in charge of the vessel, at the vessel and before she leaves the pier, was necessary to entitle the wharfinger to collect double wharfage. I have accordingly again considered the question, but am unable to see how the statute can be so construed as to entitle a wharfinger to recover double wharfage without proof of the demand of the single wharfage, made before the vessel departs from the wharf, of the owner or the consignee of the vessel, or at the vessel of the person in charge thereof at the time of the demand.

In the opinion delivered in the case of *The Francisca T.* it is said that, in order to recover double wharfage, demand of single wharfage must be made at the vessel of the owner, consignee, or person in charge; but this was inaccurate. The demand of single wharfage due must be made of the owner, the consignee, or the person in charge of the vessel; but the statute does not require the demand to be made at the vessel. With this exception, the opinion delivered in the case of *The*

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

Francisca T. states what seems to me the correct construction to be given the statute.

The argument in opposition to this construction is that the single wharfage does not become due until the vessel has left the wharf, and a lawful demand prior to the departure of the vessel is for this reason impossible, and also for the further reason that the wharfinger has no means of knowing when the vessel intends to leave, and the amount of single wharfage to be demanded cannot be known prior to the vessel's departure.

But the statute must be presumed to have been passed in view of the well-known practice to collect wharfage at the wharf by a person then present for the purpose, who, by observation and inquiry, learns the time when each vessel intends to depart, and collects the wharfage of each vessel as the vessel is about to leave. No real difficulty is found in making out and presenting a proper bill for wharfage prior to the vessel's departure.

The object of the provision in the statute respecting double wharfage was to induce the payment of wharfage when so demanded. This customary demand of single wharfage, substantially contemporaneous with the departure of the vessel, is the demand referred to in the statute where it says every vessel that shall leave a wharf without first paying the wharfage after being demanded, shall be liable to pay double wharfage. No other construction can be given the statute without, as it seems to me, doing violence to the language employed. I am therefore of the opinion that the libellant, having failed to prove a demand of single wharfage before the vessels left the wharf, cannot recover double wharfage.

The question remains whether single wharfage can be recovered. The ground here taken in defense is that the liens have been lost by laches. But no such defense is set up in the answer, and it must therefore be excluded. *The Swallow*, Olcott, 334. Aside from the absence of any averment of laches in the pleadings, it would seem that a lien created by a statute of the state which fixes no limit of time within which the lien must be enforced, is not lost by delay. Limitations declared by statutes creating liens for repairs, etc., and made dependent on the movements of the vessel, are recognized and enforced by courts of admiralty, and any limitation made by such statute to depend upon lapse of time would no doubt be recognized and enforced by admiralty courts. Upon the same principle these courts must recognize and give effect to the absence of such a limitation from the statute.

My conclusion, therefore, is that the libellant is entitled to recover against the above-named vessels, respectively, single wharfage, at the rate prescribed by the statute of the state, for the time such vessel lay at the libellant's wharf. The amount can doubtless be agreed upon. If not, let there be a reference.

THE MARY BRADFORD.¹

(Circuit Court, E. D. New York. July 16, 1884.)

BILL OF LADING—INDORSEMENT FOR VALUE—MASTER'S COPY—DELIVERY OF CARGO.

The decree of the district court in the same case (18 FED. REP. 189) affirmed.

In Admiralty.

F. E. & A. Blackwell, for libellant.

Beebe & Wilcox, for claimants.

BLATCHFORD, Justice. In this case I find the following facts:

The agent of the owners of the schooner *Mary Bradford* chartered her to William L. Carbin, of New York, for a voyage from New York to Nickerie, and back to New York, by the charter-party, dated September 12, 1881, of which a copy is set forth in the apostles. D. C. Cobb was the master of said schooner. William L. Carbin shipped on her from New York a cargo consigned to his brother R. J. Carbin at Nickerie. William L. Carbin directed the master to follow the instructions of R. J. Carbin on the arrival of the vessel at Nickerie. Bills of lading were signed in New York by the master for the cargo shipped by the vessel to Nickerie. When she arrived at Nickerie, the master discharged the cargo. He then received on board of the vessel from R. J. Carbin the merchandise covered by the bill of lading, libellant's Exhibit A, dated November 24, 1881, of which a copy is set forth in the apostles. This cargo being on board, the master signed a set of four bills of lading for it, all of the tenor of said Exhibit A. Three of these he delivered to R. J. Carbin, and one he kept himself. This last-named bill of lading was the "captain's copy," and was understood by R. J. Carbin and by the master to be such. When such captain's copy was so left with the master, no instructions were given to him in respect to it. R. J. Carbin took the said three bills of lading, and before the vessel sailed from Nickerie, hypothecated them with the libellant as collateral security for the payment of the sum of \$4,800, or its equivalent in Dutch money, and duly indorsed said bills of lading over to the libellant, and received from it said sum of money. In the bills of lading in the hands of the libellant, the words "as per charter-party" appear written between the words "said produce" and the words "with primage," as in libellant's Exhibit D in the apostles, which words are not in said libellant's Exhibit A.

The libellant was and is a foreign corporation, duly organized and existing pursuant to a charter and under the laws of the kingdom of the United Netherlands. At the time of the receipt by R. J. Carbin of the said sum of \$4,800, or its equivalent in Dutch money, to-wit, November 29, 1881, he drew three bills of exchange in a set (first, second, and third) upon his brother William L. Carbin of the tenor of Exhibit No. 1, annexed to the deposition of Arend d'Angremond, in the apostles; and also executed and delivered to the libellant a paper writing, dated November 29, 1881, a correct translation of which is contained in libellant's Exhibit F in the apostles. The libellant duly transmitted two of said bills of exchange and two of said bills of lading to its agent in the city of New York, who received them December 28, 1881. On December 29, 1881, one of said bills of exchange was duly accepted in writing by the drawee, William L. Carbin. It fell due March 2, 1882. On the eighteenth of December, 1881, the said vessel arrived at the port of New York, from Nickerie, and thereupon B. J. Wenberg, the agent of the vessel,

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

with the knowledge of her said master, took from the papers of the vessel the said "captain's copy" of the bill of lading, and delivered the same to the said William L. Carbin; the said Wenberg then knowing that the said copy was the "captain's copy," and the said William L. Carbin, before the twenty-eighth of December, 1881, received under the said "captain's copy" the merchandise named therein, from the said vessel and the said master. None of the said bills of exchange have ever been paid, or any part thereof.

The said agent, in New York, of the libelant learned on the twenty-ninth of December, 1881, that said cargo had been delivered to William L. Carbin, and thereupon, by the first opportunity, communicated that information to the libelant at Paramaribo, where it was established, and where the transaction between it and R. J. Carbin took place; and on the receipt of an answer to such communication, the libel herein was filed on March 31, 1882, as soon as the vessel could be found. On that day, the bill of lading aforesaid was presented to the master of the vessel by the agent of the libelant, and a demand was duly made for said cargo, which was refused. The bill of lading so kept by the master as the "captain's copy," was indorsed in blank at the time by said R. J. Carbin, but it did not, at that time, contain the words, "deliver to the order of William L. Carbin," or any of them, indorsed on the back thereof; nor were said words, or any of them, written thereon at any time by said R. J. Carbin, or by his authority, or that of the libelant; but said words were written thereon by William L. Carbin after the delivery of said "captain's copy" to him at New York, as they now appear in said libelant's Exhibit A.

On the foregoing facts I find the following conclusions of law :

The master was authorized to sign and deliver to R. J. Carbin the bills of lading; and, in any event, the delivery to William L. Carbin by Wenberg, the agent of the vessel, of the captain's copy of the bill of lading, was a ratification of the act of the master in delivering to R. J. Carbin the bills of lading which were delivered to him by the master. The copy of the bill of lading kept by the master was the captain's copy,—the vessel's bill of lading,—and merely for the information of the master and agent and owners of the vessel, and the delivery thereof to William L. Carbin was a wrongful act as against the libelant, for which the vessel is liable to it. The libelant was guilty of no laches.

There should be a decree for the libelant of the same tenor as the decree in its favor in the district court, with its costs in this court to be taxed.

THE CARO.¹

(District Court, E. D. New York. September 22, 1884.)

COLLISION—STEAM AND SAIL VESSELS—APPROACHING STEAMER—TORCH-LIGHT—TUG AND TOW—LOOKOUT—LIGHTS.

Where a collision occurred on the ocean between a bark and a schooner which was in tow of a tug, and the tug's lights were seen by the bark some two miles off, but the bark's lights were not seen by the tug or the schooner till collision was inevitable, the night being dark, but a good night to see lights, and the vessels approached each other on such courses that the bark passed within 100 feet of the tug, *held*, that the bark was in fault for not showing a torch on her bow, and the collision must be held on that ground alone to have been caused by her fault; that, as the bark had her side lights placed on the mizzen rigging

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

she was charged with the burden of showing clearly that the lights so placed would not be obstructed by the sails, and that the testimony failed to show this; that the tug was not in fault for having the lookout in the pilot-house, with the man at the wheel, when it was only 15 feet from the pilot-house to the stem, and a lookout stationed on the deck between the pilot-house and the stem would be in danger of being swept off by the sea; that the bark was liable for the damage arising from the collision.

In Admiralty.

Owen & Gray, for the bark.

Jas. K. Hill, Wing & Shoudy, for the schooner.

E. G. Davis, for the tug.

BENEDICT, J. These actions arise out of a collision that occurred on the night of August 15, 1884, on the ocean, about three miles to the southward of the Scotland light-ship, between the bark Caro and the schooner Josephine, at the time in tow of the steam-tug George H. Dentz. The Dentz was bound to New York, steering for the Scotland light. She had the schooner Josephine in tow upon a hawser some 75 fathoms long. The bark Caro was outward bound, and was sailing close-hauled upon the starboard tack. The tug was seen by the bark at the distance of some two miles, but the bark was not discovered by any person on the tug or on the schooner until collision between the bark and the schooner was inevitable. It is proved that the bark had her side lights set and burning, and that the tug had also the proper lights set, including the vertical lights required to indicate that she had a vessel in tow.

The proof shows plainly that the sole cause of the collision was the failure of the tug to see the bark in time. It is also plain that the night, although dark, was a good night to see lights. In the pilot-house of the tug were two persons; one engaged in steering, the other in looking out. This pilot-house was only 15 feet from the stem. A lookout stationed on the deck between the pilot-house and the stem would have been in danger of being swept off by the sea. Under these circumstances it was not negligence to station the lookout in the pilot-house of the tug.

The negligence on the part of the tug, if she was negligent, was not in placing her lookout in the pilot-house, but in the want of diligence in the man who was there placed. If the bark displayed the proper lights, the failure of those on the tug to see the bark in proper time must be attributed to a want of a diligent lookout. If the proper lights were not displayed by the bark, then the failure of those on the tug to see the bark in time must be attributed to the negligence of those on the bark in respect to their lights. One omission on the part of the bark in respect to her lights is conceded: she did not display a torch. In her behalf the contention is that the statute did not require her to exhibit a torch to the tug, because the tug was not approaching any point or quarter of the bark.

The testimony shows that the tug was approaching the bark upon such a course that she passed the tug within less than 100 feet. Un-

der such circumstances the tug was an approaching steamer, within the meaning of the statute, and the statute made it the duty of the bark, when she saw the tug so approaching, to show a lighted torch upon her bow. The burden is upon the bark to show that this omission did not contribute to cause the collision that ensued, and she has failed to do this. Upon this ground alone the collision must be held to have been caused by fault of the bark.

There is in addition considerable foundation for the belief that the location of the bark's side lights was such as to render them ineffectual to warn vessels approaching at a certain angle. These lights were placed upon the mizzen rigging, and of course aft the fore and main sail. The bark was sailing close-hauled, and the testimony leaves it in doubt whether the clew of the sails set forward of the light would not shut off the light to a vessel ahead. I am aware that many vessels carry their lights aft, and that reasons are given for preferring that location; but when on any vessel the side lights are placed aft the sails, I consider the vessel charged with the burden of showing clearly that the light so placed would not be obstructed by the sails when set.

The testimony in this case has not satisfied me that the side light of the bark would not be obstructed by the clew of her sail when close-hauled, owing to her side light being placed upon her mizzen rigging. An obscuration of the bark's side light by the clew of this sail would account for the fact proved, that not only did the two men on the tug fail to discover the bark's light until she was upon them, but the men on the schooner in tow of the tug also failed to see the bark's light until she was close at hand. The tug's lights were seen from the bark at a distance of two miles, and if the bark's lights were unobstructed, it is difficult to understand why neither of two men on the tug, and none of several men on the schooner in tow, saw them until the bark was close by, although, as they say, all were looking forward for lights. An obstruction of the bark's light by the clew of her sail would account for this; and, as before remarked, I am not satisfied that such was not the case, owing to the light's being placed in the mizzen rigging.

Upon these grounds, therefore, the libel of the owner of the bark Caro against the George H. Dentz must be dismissed, and the libel of the owner of the schooner Josephine must be sustained as against the bark Caro, and dismissed as against the tug Dentz.

PRESTON v. SMITH.¹

(Circuit Court, E. D. Missouri. May 26, 1885.)

BILL TO QUIET TITLE—LIFE-TENANT AND REMAINDER-MAN.

A remainder-man cannot maintain a bill against a life-tenant to prevent his denying the former's interest in the estate, and from making leases extending beyond the term of his natural life.

In Equity.

Henry Hitchcock, for complainant.

John Wickham and Given Campbell, for defendant.

TREAT, J. The bill alleges that the defendant is a tenant for life, and the plaintiff remainder-man in fee, expectant on certain impossible conditions to the contrary. It charges that she has made, and is about to make, leases extending beyond the term of her natural life; and also is asserting that the defendant has no title or interest in the estate. The court is prayed to enjoin said defendant from making such leases, and from asserting that defendant has no title or interest in the estate. The proposition is somewhat novel. Without undertaking to review the many cases cited as to bills of peace, or *quia timet*, whether parties are in or out of possession, it must suffice that none goes so far as to uphold a bill against a tenant for life, in possession, to restrain him from making leases which might by possibility extend in terms longer than his natural life. It is obvious that if defendant is only tenant for life, no lease by her made could extend legally beyond her life. Hence there is no occasion for the interposition of equity to restrain one from doing a legal impossibility. It may be that the purpose of this proceeding was to obtain a judicial decision as to the title in the plaintiff, if any, subsequent to the death of the defendant. Why should she, during her life-time, be made a party to controversies which can arise only between others after her death? It may or may not be that the claim of the plaintiff is ill-grounded, and that she and the other children of William Christy are entitled to said estate. The court cannot pass upon that question on the present demurrer.

Demurrer sustained.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

WABASH, ST. L. & P. R. CO. *v.* CENTRAL TRUST CO. OF NEW YORK

(Circuit Court, D. Indiana. May 9, 1885.)

1. RAILROAD COMPANIES—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—MATTER OF DEFENSE.

In actions for injuries caused by negligence, contributory fault is, in the federal courts, matter of defense, of which the burden of proof is upon the defendant, and consequently reasonable presumptions in respect to matters not proven or left in doubt should be in favor of the injured party

2. SAME—CONTRIBUTORY NEGLIGENCE DEFEATS ACTION, WHEN.

Culpable negligence of the complainant, properly so called, which contributed to the injury, must always defeat the action; but the nature of the primary wrong has much to do with the judgment, whether or not the alleged contributory fault was blameworthy. If it was of a negative character, such as lack of vigilance, and was itself caused by, or would not have existed, or no injury would have resulted from it, but for the primary wrong, it is not in law to be charged to the injured one, but to the original wrong-doer.

3. SAME—ACTING ON PRESUMPTION THAT RAILROAD TRAINS WILL BE OPERATED WITH DUE CARE.

A party has not an unqualified right to act on the presumption that railroad trains and other dangerous agencies will always be operated with the care and vigilance required by law or custom; and if he goes upon railroad and highway crossings, or into like dangerous situations, without precautions against negligence on the part of those in charge of such agencies, he will himself be guilty of negligence.

4. SAME—FINDING NOT SUSTAINED BY EVIDENCE.

Every case must be determined upon its own circumstances. Finding of the master that petitioner was guilty of contributory negligence, and not entitled to recover for the injury received, *held* not sustained by the evidence.

Exceptions to Master's Report. Intervening petition of Thomas Ingram.

Jacob B. Julian, for petitioner.

Chas. B. Stuart, for receivers.

WOODS, J. The master has found against the petitioner on the ground of contributory negligence, and the question presented is whether or not the finding is supported by the evidence. The entire evidence upon the point, and the master's view of it, are set forth in the report as follows:

Elijah Ingram testified as follows: "I am petitioner's son, and had charge of team when mare was injured. It was between 10 and 12 o'clock A. M. Was hauling gravel for Hanway & Cooper. I was unloading gravel on the north side of the tracks, on East street. A Wabash train came backing down. I was not looking for a train. I saw it across the street, and tried to get horses away, and could not. There was a man walking along at rear of train, and I told him to stop it, and he gave the signal, but it did not stop until the rear car struck the mare. I did not hear bell nor whistle." *Cross-examined.* "I had been hauling there 3 or 4 days or a week, and knew trains were running on that track. I did not want to drive onto the track, because it was dangerous; but was told to drive in there by the man who was there in charge for Hanway & Cooper. My team was facing west, and there was no time for me to get them out of the way after I saw the train coming. I knew I would be in that fix if train came. The brakeman who was walking along by the

rear end of the train was walking as fast as the train was coming. From where I was the only way I could get out was to back out. I could not see the engine from where I was. The rear end of train passed the length of a box car past me before it stopped. Nobody told me to get out of the way. None of the wagon wheels were on the track. I was dumping gravel near the north rail of the north track, on the west side of East street. The mare that was injured was probably on the track with her fore feet. I could not drive ahead, because there was a deep gutter. I could not turn around, because the flag-man's station was in the way; and I could not drive ahead or back the team, for the wagon was partly unloaded, and the planks, which had been turned to let the gravel out, prevented my moving the wagon in the condition it was."

Martin Higgins, for defense, testified as follows: "Was working there for Hanway & Cooper, contractors; it was my business to count loads, give tickets to teamsters, and direct them where to dump gravel. I gave this boy a ticket and told him to unload and get out; that a train might be in soon. I crossed over to the south side of the tracks to the office and sat down. Presently I heard somebody holler. I looked, and ran over and helped the boy get wagon out. There was nothing to prevent the boy from getting out by driving across the track. He stood holding the horses and made no effort to get them out. The train was moving very slow. He had plenty of time to drive over the track. I do not know who yelled to the boy. The boy spoke to me and said it was my fault in ordering him to drive on. I said, 'No; you ought to have unloaded and got out.' I told him to go home. The planks of the wagon-bed would not have prevented the team from pulling out." *Cross-examined.* "East street is 60 feet wide. When I heard the noise I looked up and saw the cars. They had not got to the east side of the street yet. I looked at the cars and then at the boy. Did not hear the boy tell brakeman to stop train. I heard shouting, and think it was the flag-man or some one on the train. I did not hear bell or whistle. I expect likely I would have heard signal if it had been given. The boy was holding horses, and they were turned south. Neither horse was on track. May be they had fore feet on track. I was there when the boy came, and it was my duty to direct them where the dumping was to be done. I told the boy to drive in there, and he put gravel where I told him to put it. The boy could have driven across the track with empty wagon. Do not know how it would be if loaded or with $\frac{1}{2}$ load on. If he first saw cars 30 feet away he could not have got out. He was about 5 or 6 feet east of west gutter of East street. From time I saw him holding horses, he could have driven out. Do not know width of west gutter. The horses stood quartering on track; one horse a little bit on track. I do not know whether boy went right to work unloading when I gave him ticket. Boy, from where he was, could see up track as far as I could." *Re-examined.* "If boy had kept a lookout and unloaded, he could have got out. I do not know whether the load was dumped or not. The boy could see 100 feet east of East street from where he stood."

[By request of parties the master accompanied counsel to the place where the animal was injured, and discovered that, from where the boy stood with his team, he could see up the track in the direction from which the train came a distance of over 300 feet.]

Upon this evidence I report and find that the petitioner's claim should be disallowed, for the reason that, in my opinion, the evidence shows that the carelessness and negligence of the petitioner's son, who was in charge of the team, contributed to produce the injury for which damages are claimed.

I find that the receivers' employes were guilty of negligence in failing to give the signals required, but that the defendant's son, with full knowledge of the danger, and after being warned of it just before the injury occurred, placed his team where a moving train would certainly injure it, and never

once looked in the direction from which the train approached until it was so close that he could not get his team away. From where he stood, he could have seen the approaching train, which was not moving faster than a man could walk, at least 300 feet up the track. He says that when he looked up the track the train was less than the width of a street away, and he did not have time to get out.

I am not satisfied that the failure of the teamster, while dumping his load along-side the railroad track, to look in the direction from which the train came, should be deemed to be of such significance as to control the decision of the case. In actions for injuries caused by negligence, contributory fault is, in the federal courts, matter of defense, of which the burden of proof is upon the defendant, (*Railroad Co. v. Gladmon*, 15 Wall. 401; *Railroad Co. v. Horst*, 93 U. S. 291; *Hough v. Railway Co.* 100 U. S. 213;) and consequently reasonable presumptions and inferences in respect to matters not proven or left in doubt should be in favor of the injured party.

Under this rule it may be presumed—as, indeed, on argument it was conceded—that the car by which the injury was done, was not part of a passing train, but was being moved by a switching engine, and was in charge of men presumably familiar with the locality, and, as the work had been in progress for three or four days, doubtless cognizant of the fact that the street was being improved at and near the railroad crossing. With this knowledge, besides the sounding of the locomotive bell, which is required by the city ordinance, they were bound to use all reasonable precautions to prevent injury to those engaged in the work, and this the driver of the petitioner's team had the right to expect, and presumably did expect, of them; but even if no such thought was in his mind, and if in the exercise of greater caution he had been on the lookout, and had seen the car 300 feet or more away, moving slowly behind the walking brakeman, no signal by bell or otherwise being given of a purpose to cross the street, he would have been justified in inferring that a crossing of the street was not intended. The cars were evidently under full control, and might have been easily and promptly stopped; indeed, it is inexplicable why they were not stopped. That they were not, was gross carelessness, amounting, apparently, on the part of the brakeman, to a conscious willingness, if not to a desire, to inflict the injury. If the boy was less vigilant than he might have been, it is reasonably certain that, if proper signals had been given, he would have been aroused in time to have escaped, and would have escaped, all harm. Whatever want of diligence there was, therefore, may well be said to have occurred because of the antecedent fault of those who were moving the cars, and the consequences are attributable to them and to the receiver, rather than to the driver of the team.

It is probably too much to say, in this connection, as in effect it seems to have been said in some cases, that the negligence of the wrong-doer may excuse that of the injured party. Culpable negligence of the complainant, properly so called, which contributed to the

injury, must always defeat the action; but the nature of the primary wrong has much to do with the judgment, whether or not the alleged contributory fault was blameworthy. If it was of a negative character, such as lack of vigilance, and was itself caused by, or would not have existed, or no injury would have resulted from it, but for the primary wrong, it ought not, in reason, and I believe is not, in law, to be charged to the injured one, but rather to the original wrongdoer. This seems to be the meaning of the Indiana supreme court in the case of *Chicago & E. R. Co. v. Boggs*, decided February 18, 1885, and supported by the following among other citations: *Railway Co. v. Martin*, 82 Ind. 476; *Railway Co. v. Yundt*, 78 Ind. 376; *City v. Gaston*, 58 Ind. 224; *Beisiegel v. Railroad Co.* 34 N. Y. 622; *Owen v. Railroad Co.* 35 N. Y. 516; *Ernst v. Railroad Co.* 39 N. Y. 61; *Davenport v. Ruckman*, 37 N. Y. 568; *Kennayde v. Railroad Co.* 45 Mo. 255; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 71; *French v. Taunton B. R. R.* 116 Mass. 537; *Sweeny v. Railroad Co.* 10 Allen, 368.

It would not be correct, I think, to say on this subject that citizens have an unqualified right to act upon the presumption that railroad trains and other dangerous agencies will always be operated with the care and vigilance required by law or custom. Experience too often proves the contrary; and ordinarily prudent men will not, and with out negligence do not, go upon railroad and highway crossings, or into like dangerous situations, without precautions against negligence on the part of those in charge of the dangerous agencies. But every case must be determined upon its own circumstances; and for the reasons already indicated I do not think that the injury suffered by the petitioner in this instance is, in the sense of the law, shown to be attributable to the fault of his agent. The damages are shown to have been \$85, and for that amount the claim should be allowed.

Ordered accordingly.

SMITH v. EWING and another.

(Circuit Court, D. Oregon. June 1, 1885.)

1. CERTIFICATE OF PURCHASE UNDER PRE-EMPTION LAW.

A certificate of purchase issued in due form, in favor of a pre-emptor, for land subject to entry under the pre-emption law, cannot be canceled or set aside by the land department for alleged fraud in obtaining it; but in such case the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals in like circumstances.

2. INNOCENT PURCHASER.

Semble, that a purchaser in good faith, and for a valuable consideration, from a pre-emptor of the land included in the latter's certificate of purchase takes the same purged of any fraud which might have been committed in obtaining said certificate.

Suit to Determine Estate in Real Property and for an Injunction.
John J. Balleray and J. M. Bower, for plaintiff.

James F. Watson, for defendants.

DEADY, J. This suit is brought by a citizen of Georgia, to obtain a decree enjoining the defendants, who are citizens of Oregon, from trespassing on certain lands situate in Umatilla county, Oregon, and that any claim they may have thereto may be declared null and void. The defendants answered separately, and the cause was heard on exceptions to the answer of the defendant Ewing for impertinence.

It appears from the bill that on August 20, 1881, Arthur Webb settled, as a pre-emptor under the laws of the United States, on and improved the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 2, in township 2 N., of range 32 E. of the Wallamet meridian, and on the following day filed in the local land-office at La Grande his declaratory statement therefor; that on July 29, 1882, after due publication of notice thereof, Webb made his final proof of such settlement and improvement to the satisfaction of the register and receiver of said office, and paid for the land at the rate of \$2.50 per acre, or \$396.20 in all, for which he received from said receiver "a certificate of purchase and entry of said land as by law required," which on July 31, 1882, was duly recorded in the county clerk's office; that on the same day D. K. Smith purchased said land from said Webb, in good faith and for a valuable consideration, to-wit, \$2,000; and took a conveyance thereof from said Webb, which was duly recorded on the same day; that on December 1, 1884, the plaintiff purchased said land from said Smith, subject to a mortgage thereon given to the American Mortgage Company of \$1,000, in good faith and for valuable consideration, to-wit, \$1,000, and received a conveyance thereof from said Smith, and is now the owner and in possession of the premises, which are valuable for agricultural purposes and reasonably worth \$5,500; that on or about July 10, 1883, the defendant Ewing wrongfully entered on the premises and built a dwelling-house thereon, in which he has since and now resides, and cultivates about five acres thereof and cuts timber thereon; and that he denies the plaintiff's title and interest in said land, and disputes his possession thereof, and claims an estate or interest therein adverse to the plaintiff.

By his answer, the defendant Ewing admits that Webb erected a building on the premises, and filed a declaratory statement thereon and entered the same, as a pre-emptor, as alleged in the bill; but denies that the plaintiff, or those under whom he claims, were ever the owners of the premises, or that the plaintiff is in possession of the same; and alleges that on April 21, 1876, he, being duly entitled to the benefit of the pre-emption law, settled on the premises under said law and filed his declaratory statement thereon; and afterwards, on December 4, 1876, with the permission of the register and receiver, "duly changed" "said entry,"—meaning, I suppose, said "declaratory

statement;" that the settlement and entry of Webb was in "conflict" with that of Ewing's, as changed on December 4th; that soon after the entry of the premises by Webb, but when is not stated, the defendant applied to the register and receiver to contest "the claim" of the former to the land included in his "declaratory statement and pretended entry upon the grounds above stated;" that thereafter such proceedings were had on such application that a contest was ordered thereon by the commissioner of the general land-office, and a hearing had before the register and receiver on January 17, 1883, who thereupon decided that neither said Webb nor said Ewing had complied with the pre-emption law in the matter of residence, cultivation, and improvement, and recommended "the cancellation of the filings and entries of both of said parties by the commissioner;" that Webb appealed from said decision to the commissioner, who affirmed the same, and from there took the case to the secretary of the interior, where D. K. Smith, the grantor of the plaintiff, intervened for his rights as a purchaser from Webb, as alleged in the bill herein, and asked that a patent for the land included in the declaratory statement of the latter be issued to him, but the secretary denied said application, and on February 21, 1884, affirmed the decision of the commissioner, and that thereupon said filings and entries were canceled by said commissioner, and "all rights thereunder wholly annulled;" and that by reason of such contest and cancellation, the defendant became entitled under the law to enter said lands within 30 days from the date of said cancellation, and that he did within such period, to-wit, on March 17, 1884, apply to said land-office "to enter said tract as a homestead," which application was allowed; whereupon he "commenced to reside upon and cultivate and improve said land as a homestead," and has ever since continued to do the same.

The plaintiff excepts to so much of this answer as sets up the settlement and filing of Ewing on the premises in 1876, the contest thereabout with Webb in 1883, and the decisions thereon, and his subsequent entry of the land as a homestead, as impertinent. The ground on which this exception is based is that as soon as Webb entered the land at the local land-office, and received the certificate of purchase, it became his property; the legal title remaining in the vendor in trust for him until the patent should issue in due course of proceeding. That while any person interested may appear on the notice of final proof required by the act of March 3, 1879, (20 St. 472,) and contest the right of a settler to become a purchaser under the pre-emption law, and thereby prevent a certificate of purchase from being issued to such settler, or cause the same to be canceled on an appeal from the decision of the local land-office allowing the entry to be made, yet the government of the United States, having satisfied itself through its local agents, in the manner provided by law, that Webb was entitled, under the pre-emption law, to purchase the land, and having thereupon sold it to him, cannot institute a contest in

the land department between the purchaser and any one else, or even itself, to set aside, cancel, or recall said certificate.

Section 2273 of the Revised Statutes gives the register and receiver the right to determine "all questions as to the right of pre-emption arising between different settlers" on "the same tract of land," saving the right of appeal to the commissioner and the secretary of the interior. But at the date of Webb's entry and this alleged contest, Ewing's claim to the premises under his filing in 1876 was forfeited for want of final proof and payment within 30 months thereafter. Section 2267, Rev. St. He was then a stranger to the proceeding, and without interest in or relation to the land. No question could arise between Webb and him, as settlers thereon, nor as to the right of either to pre-empt the same. By reason of his neglect to make his final proof and payment, the effect of Ewing's filing had ceased, and he had long lost his *status* as a claimant under the pre-emption law. Therefore this proceeding in the land department that resulted in the attempted cancellation of Webb's certificate must be regarded, not as a contest under section 2273 of the Revised Statutes between two settlers on the same tract of land, but as an *ex parte* proceeding, instituted by the commissioner for the purpose of canceling Webb's certificate, upon the suggestion of a stranger that it was fraudulently obtained. The fact that Webb saw proper to participate in it with a view of protecting his certificate, does not affect its character in this respect.

Has the commissioner any such power? It is not given to him in terms by any act of congress that I am aware of. His right to pass upon conflicting claims to land under the pre-emption law seems confined to cases that come before him on appeal from the decision of the register and receiver, in case of a contest between two or more settlers under such law. Doubtless the commissioner may also refuse to give effect to a certificate, and issue a patent thereon, when it appears from the face thereof, or the proof accompanying it, that it was issued contrary to law. But if the land is open to pre-emption, and the proof is formally sufficient, as that it is made by the oaths of the proper and prescribed number of witnesses to the necessary facts, the commissioner cannot disallow the certificate, or refuse to issue a patent thereon because the proof is not satisfactory to his mind, or because it is suggested to him that it is false. The law devolves the determination of that question on the register and receiver, (Rev. St. § 2263,) and it can only come before the commissioner on an appeal from their decision by a party to a contest before them.

When a certificate of purchase has been issued to a pre-emptor in due form, and no appeal has been taken from the decision or action of the register and receiver, the land described in the certificate becomes the property of the pre-emptor. He has the equitable title thereto, and has a right to the legal one as soon as the patent can issue in the due course of proceeding; and he can dispose of the

same, and pass his interest therein, as if the purchase had been made from a private person. *Carroll v. Safford*, 3 How. 460; *Myers v. Croft*, 13 Wall. 291; *Camp v. Smith*, 2 Minn. 155, (Gil. 131;); *Cornelius v. Kessel*, 58 Wis. 237; S. C. 16 N. W. REP. 550; *Brill v. Stiles*, 35 Ill. 309; *Sillyman v. King*, 36 Iowa, 207; *Moyer v. McCullough*, 1 Ind. 339.

In *Carroll v. Safford* it was ruled that land held under a certificate of purchase from the United States land-office was subject to state taxation as the property of the purchaser. In delivering the opinion of the court, Mr. Justice McLEAN said:

"When the land was purchased and paid for it was no longer the property of the United States, but of the purchaser. He held it for a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee."

In *Moore v. Robbins*, 96 U. S. 538, it was held that a patent, issued by the land department, acting within the scope of its authority, passes the legal title to the land, and all control of the executive department of the government over the title thereafter ceases; that if any wrong has been done to the United States, the courts of justice are open to it, as in the case of an individual, to have redress by cancellation of the patent or reconveyance of the land. But whether a final certificate or certificate of purchase, issued in due form to a pre-emptor or other purchaser of public land by the register and receiver of a local land-office, is within this rule, subject to the right of the commissioner or secretary to modify or set the same aside upon a direct appeal to either of them, the supreme court has not decided, that I am aware of. The cases of *Lytle v. Arkansas*, 9 How. 314, *Garland v. Wynn*, 20 How. 6, and *Harkness v. Underhill*, 1 Black, 316, have been cited and considered, but however they may bear on the question, they are not, in my judgment, decisive of it.

To my mind, the certificate of purchase, subject to the condition mentioned, is ~~within~~ the reason of the rule laid down in *Moore v. Robbins*, in the case of a patent. The issue of a patent or final conveyance on such a certificate is a mere ministerial act, of which the purchaser, in the case of private parties, might compel the performance. Several of the state courts have decided that the certificate of purchase, when issued in due form, for land subject to entry, is beyond the power of the commissioner, otherwise than on a direct appeal from the register and receiver. In *Perry v. O'Hanlon*, 11 Mo. 585, the supreme court of Missouri held that a cancellation of a pre-emption certificate by the commissioner was a nullity. To the same effect is the ruling in *Brill v. Stiles*, 35 Ill. 309; *Cornelius v. Kessel*, 58 Wis. 241; S. C. 16 N. W. Rep. 550.

The statement in the answer as to the time and manner of insti-

tuting the alleged contest with Webb seems purposely obscure. The hearing therein, before the register and receiver, appears to have been had in January, 1883; while it appears from a notice signed by the register of Webb's application to make final proof, addressed to Ewing at "Rio Vista, California," and annexed to a written brief filed by him herein, that he was living in California as late as August, 1882. So that instead of being "soon after," it must have been more than a year after the certificate was issued to Webb that Ewing returned to Oregon and applied for leave to contest the former's entry. But assuming, as I do, that the proceeding before the register and receiver was had on the direction of the commissioner, without the authority of law, the cancellation of Webb's certificate of purchase and Ewing's subsequent entry of the premises under the homestead law are mere nullities. This being so, the exceptions for impertinence are well taken. The matter embraced in them is altogether immaterial, and not a defense to the relief sought by the bill. Neither does it appear from Ewing's answer that the second or changed filing of December 4, 1876, was for the land in question. The allegation is that on that day, with the consent of the register and receiver, he changed his declaratory statement, but how much or wherein is not stated. In the opinion of the secretary, which is annexed to the answer as an exhibit, however, it crops out incidentally that the change consisted in throwing out the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the section, and adding thereto lots 6 and 7 of the same. Nothing definite can be ascertained from this without reference to the plat of the public survey of the section, from which it appears that the boundary line of the Umatilla reservation cuts off the south-east corner of it, leaving the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ a mere fraction containing 3.32 acres, and known as lot 6; and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, also a fraction, containing 38.9 acres, and known as lot 7. Practically, then, the second or changed Ewing statement includes three of the four 40-acre tracts included in Webb's purchase, and lot 6 of the same section. Whether this was "a second declaration for another tract" within the prohibition contained in section 2261 of the Revised Statutes is a question. Certainly it was not for the same tract as the first filing, though not wholly for "another" or different one.

On the argument counsel for the plaintiff laid great stress on the fact, as he assumed it to be, that he was a purchaser in good faith for a valuable consideration, claiming that, as the defendant had not answered the allegation of the bill to that effect, it was admitted to be true. But such is not the rule in equity pleading, though it would be very convenient if it were so. An allegation in a bill which is neither admitted nor denied by the answer is still only an allegation, and must be proved before the plaintiff can have any relief based on it. If he wishes to prove it by the answer of the defendant, he can compel the latter to testify upon the point by excepting to the answer for insufficiency.

The exception made in section 2262 of the Revised Statutes, in favor of a *bona fide* purchase for a valuable consideration from a person holding a certificate of purchase under the pre-emption law, is only against the forfeiture of the land denounced by that section on account of the falsity of the oath thereby required of the settler as to his right to enter land under the pre-emption law, and his purpose in doing so. But in this case it was alleged that the pre-emptor never complied with the law as to residence, improvement, and cultivation, and that the certificate of purchase was issued to him upon false or insufficient proofs of these facts. To such a case section 2262 does not appear applicable. But at common law, where a party obtaining a conveyance of real property by a fraud practiced upon the grantor conveys the same to a third person, who buys in good faith and for a valuable consideration, the latter will hold the property purged of the fraud. *Fletcher v. Peck*, 6 Cranch, 133; *Somes v. Brewer*, 2 Pick. 184; *Deputy v. Stapleford*, 19 Cal. 302; 2 Story, Eq. Jur. § 1502; 2 Washb. Real Prop. 597. And in *U. S. v. Minor*, 5 Sup. Ct. Rep. 836, lately decided by the supreme court, it is said that when a person obtains a patent for land under the pre-emption law by "fraud and perjury, it is enough to hold that it conveys the legal title; and it would be going quite too far to say that it cannot be assailed by a proceeding in equity, and set aside as void if the fraud is proved *and there are no innocent purchasers for value.*"

But whether this rule is applicable to a purchase made from a pre-emptor after entry and before patent issues may be a question. Regarding the sale of the land, however, as completed when the proof of compliance with the law is made to the satisfaction of the agents of the vendor,—the register and receiver,—and the purchase price paid to them, my impression is that an innocent purchaser for a valuable consideration from the party having the certificate of purchase takes the land, and the right to the patent, purged of any fraud that may have been committed by his grantor in obtaining such certificate. Of course, where the invalidity of the certificate is apparent on its face or is a matter of law, of which all persons are presumed to have knowledge, the purchaser would take with notice of such invalidity, and be bound by it accordingly. But be this as it may, my conclusion is that a certificate of purchase issued in due form, in favor of a pre-emptor, for land subject to entry under the pre-emption law cannot be canceled or set aside by the land department for alleged fraud in obtaining it; and that in such case the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. The right of a party holding a certificate of purchase of public land, and that of his grantee, is a right in and to property of which neither of them can or ought to be deprived without due process of law.

The exceptions to the answer are allowed.

UNITED STATES *v.* KANE and others.*(Circuit Court, D. Colorado. 1885.)*

1. RECEIVERS—INTERFERENCE OF STRIKERS—INDUCING EMPLOYEES TO LEAVE SERVICE—CONTEMPT.

Where employes of a railroad company that is in the hands of a receiver appointed by the court, are dissatisfied with the wages paid by the receiver, they may abandon the employment, and by persuasion or argument induce other employes to do the same; but if they resort to threats or violence to induce the others to leave, or accomplish their purpose, *without actual violence*, by overawing the others by preconcerted demonstrations of force, and thus prevent the receiver from operating the road, they are guilty of a contempt of court, and may be punished for their unlawful acts.

2. SAME—CONSPIRACY TO DO UNLAWFUL ACT—LIABILITY OF ALL FOR ACTS OF INDIVIDUAL CONSPIRATOR.

Where a party of men combine with intent to do an unlawful thing, and in the prosecution of that unlawful intent one of the party goes a step beyond the balance of the party and does acts which the balance do not themselves perform, all are responsible for what the one does. It is essential, however, that there should be a concert of action,—an agreement to do some unlawful thing.

H. H. Hobson, U. S. Dist. Atty., and *E. O. Wolcott*, for receiver.
Ralph Talbot, for defendants.

BREWER, J., (*orally*.) Now, coming to these contempt cases, the stenographer very kindly copied out all his notes last night and furnished the transcript to me; so I have had an opportunity to read over the testimony, and I have done it very carefully.

I think a few preliminary considerations, in reference to the common rights which we all have as free men in this country, may not be amiss. Every man has a right to work for whom he pleases, and to go where he pleases, and to do what he pleases, providing, in so doing, he does not trespass on the rights of others. And every man who seeks another to work for him has a right to contract with that man, to make such an agreement with him as will be mutually satisfactory; and unless he has made a contract binding him to a stipulated time, he may rightfully say to such employe at any time, "I have no further need of your services."

Now, it is well to come down to simple things. Supposing Mr. Wheeler has a little farm of 20 acres. He comes to Mr. Orr and says to him, "Here, work for me, will you?" and Mr. Orr goes to work for him under some contract. Now, every one of us realizes the fact that if Mr. Orr is tired of working there, if he does not think the pay is satisfactory, or if it is a mere whim of his, he has a right to say, "Mr. Wheeler, I won't work for you any more," and Mr. Wheeler would have no right to do anything. Mr. Orr is a free man, and can work for whom he pleases, and as long as he pleases, and quit when he pleases; and that right which Mr. Orr has Mr. Wheeler has also. The fact that Mr. Wheeler happens to be an employer does not abridge his freedom. If he is tired of Mr. Orr's work, or if he dislikes the man, or if he does not want any more of his assistance on his

place, he can say to Mr. Orr, and say very properly, "I have paid you for all the time you have worked; now you can leave, and seek work elsewhere." Those are common, every-day, simple rules of right and wrong we all recognize. Nobody doubts that. Nobody would think for a moment, in a simple case of that kind, of questioning the right, either of Mr. Orr to quit or of Mr. Wheeler to say, "You may leave." And that which is true in these simple matters where there is a little piece of property, and a single owner and a single laborer, is just as true when there is a large property, a large number of employes, and a corporation is the owner. Rules of right and wrong, obligations of employer and obligations of employe, do not change because the property is in the one instance a little bit of real estate, and in the other a large railroad property; and if we apply these simple, commonplace rules of right and wrong, we avoid, oftentimes, a great many of the troubles into which we come.

Moving on a little further to another matter. Supposing Mr. Wheeler had two men employed, and that he finds that in the management of his little farm he is not making enough so that he can afford to employ two laborers, and he says to one of them: "I will have to get along without your services, and I will do with the services of the other," and the one leaves. That is all right. Supposing the one that leaves goes to the one who has not left and says to him: "Now, look here; leave with me,"—giving whatever reasons he sees fit, whatever reasons he can adduce,—and the other one says: "Well, I will leave," and he leaves because his co-laborer has persuaded him to leave,—has urged him to leave; that is all right. Mr. Wheeler has nothing to say; he may think that the reasons which the one that is leaving has given to the one that he would like to have stay are frivolous, not such as ought to induce him to leave, but that is those gentlemen's business. If the one whom he would like to have stay is inclined to go because his friend has urged him, has persuaded him, has induced him to leave, Mr. Wheeler cannot say anything. That is the right of both these men,—the one to make suggestions, give reasons, and the other to listen to them, and act upon them.

But supposing—and I will take the illustration that I partially suggested yesterday—supposing one is discharged and the other wants to stay, is satisfied with the employment; and the one that leaves goes around to a number of friends and gathers them, and they come around, a large party of them,—as I suggested yesterday, a party with revolvers and muskets,—and the one that leaves comes to the one that wants to stay and says to him: "Now, my friends are here; you had better leave; I request you to leave;" the man looks at the party that is standing there; there is nothing but a simple request,—that is, so far as the language which is used; there is no threat; but it is a request backed by a demonstration of force, a demonstration intended to intimidate, calculated to intimidate, and the man says: "Well, I would like to stay, I am willing to work here, yet there are too many

men here, there is too much of a demonstration; I am afraid to stay." Now, the common sense of every man tells him that that is not a mere request,—tells him that while the language used may be very polite and be merely in the form of a request, yet it is accompanied with that backing of force intended as a demonstration and calculated to make an impression; and that the man leaves, really because he is intimidated.

If I take another illustration I will make it even more plain. Supposing half a dozen men stop a coach, with revolvers in their hands, and one man asks the passengers politely to step out and pass over their valuables; and they step out and pass over their valuables; and supposing those men should be put on trial before any court for robbery, would not you despise a judge that would say, "Why, there was no violence; there were no threats; there was simply a request to these passengers to hand over their valuables, and they handed them over; it was simply a request and a loan of their valuables?" Would not the common sense of every man say that that request, no matter how politely it was expressed, was a request backed by a demonstration of force that was really intimidation, and made the offense robbery? Would not you expect any judge to say that? Would not you despise any one that would say otherwise? And so, as I suggested yesterday to my brother TALBOT,—and he has argued his case with very great clearness,—that is really the question here: whether these parties went there simply, as persons have a right to do, to request engineers and train-men to desist from further labor, or whether they went there, under the circumstances, with such a demonstration of force, with such an attitude and an air, that although nothing but a request was expressed, it was a request which men did not dare decline to comply with. The fact that half a dozen men went there and asked an engineer, or a brakeman, or a train-man to quit,—that is all right, if it was simply a mere matter of request, a mere matter of giving views and reasons. That is a part of the common right of us all. We all can express our opinions. We can go to any friend and urge him to do this or do that; that it is a part of the common liberties of every man in this country; and the question is not, whether these gentlemen went there in a pleasant way and stated reasons, or urged their friends to quit work, but, did they go with such an intended demonstration of power, and in such an attitude, that though, as they have stated here, they simply requested these engineers and employes to quit, they did it under circumstance that the engineers and the train-men were intimidated, and quit because they felt compelled to. I do not suppose that the court would be concluded by the mere statement of an engineer that he was afraid, because that might have been simply an excuse for his conduct, or it might have been because he was a timid man, and there was really no such demonstration that a sensible man, an ordinary man, a prudent and fair-minded man, had any reason to expect any further trouble.

So, before the government can properly ask the court to treat these defendants as in contempt, it must satisfy the court that these requests were, in fact, something more than mere requests; that whatever language may have been used, it was used under such circumstances and with such demonstrations that the employes, the engineers, and the train-men felt that, as prudent men, they must leave; that, because of due regard for their own safety and their own well-being, they had to leave; and also that that demonstration was made under the circumstances with the intent to accomplish that result. If that is shown, if the testimony makes it clear that these parties went in such numbers, and conducted themselves in such a way, that while they simply said, "Please get off this engine," or "We want you to get off this engine," they intended to overawe,—intended, by the demonstrations which they made, to impress upon the minds of the engineers and train-men that personal prudence compelled them to leave,—why, then the government has made out its case. It is not necessary that there should be actual violence. As my brother TREAT said in a similar case, (*In re Doolittle*, ante, 544,) that we had before us in St. Louis, a request, under these circumstances, is a threat. Every sensible man knows what it means, and courts are bound to look at things just as they are, to pass on facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention.

Then there is another proposition that comes in,—a familiar rule of law,—that where a party of men combine, with the intent to do an unlawful thing, and in the prosecution of that unlawful intent one of the party goes a step beyond the balance of the party, and does acts which the balance do not themselves perform, all are responsible for what the one does. In order to make that rule of law applicable, there must be a concert of action; an agreement to do some unlawful thing. If there is no such agreement, no such preconcert of action, why then each individual is responsible simply for what he does. Thus, for instance, if there should happen to gather here on the street 50 or 100 or 200 men, with no preconcert of purpose, accidentally meeting here, and a street fight should develop in their midst, all of that crowd are not responsible for it; that would be unjust; that would be unfair; because they did not go there, they did not meet together, with a preconcerted purpose to do anything unlawful, and, although something unlawful may be done in that crowd, yet only they are at fault who do the unlawful thing. But if they all met, as I said, for the purpose of doing some unlawful act, having formed beforehand the purpose to do it, and are present there to carry that purpose into effect, then every man, by virtue of uniting in that preconceived purpose to do the unlawful thing, makes himself responsible for what any one does.

A familiar illustration which often comes before a court is this: Supposing three or four men form a purpose to commit burglary, and

break into a house for the purpose of committing that burglary; that is all they had intended to do; that is the unlawful act, and the single unlawful act, which they had set out to accomplish; they get into the house and somebody wakes up, and one of the party shoots and kills. Now, the three or four persons who went into that house never formed beforehand the intent to kill anybody; they simply went in there to commit burglary; but, combining to do that unlawful thing, in the prosecution of that burglary, and to make it successful, one of the party shoots and kills, and the law comes in and says: "All of you are guilty of murder; we do not discriminate between you; you broke into that house to commit burglary; in the prosecution of that burglarious entrance one of your party committed murder; all are guilty."

Now that is a reasonable rule, when you stop to think of it; it is not a mere harsh, arbitrary, technical rule which the courts have laid down, and the statutes have established; it is a rule intended to prevent combinations or conspiracies to do an unlawful thing, and where there are many together it is often difficult to distinguish the one who does any particular act. I have a very forcible illustration right in this testimony before me. Mr. Tyler is charged by one or two witnesses with having said, in one of those interviews with one of the engineers, after some colloquy, and a man saying he was not afraid to take that engine and train out, "What about the after-clap?" Now Mr. Orr comes forward and says, and Mr. Tyler too, that Mr. Tyler did not use that expression. Mr. Orr said he heard the remark, but it was a remark from some one at his right, and was not made by Mr. Tyler. That will often be true where there are many together; in the excitement which attends such a gathering, it is often very difficult to individualize the particular actor or speaker, and while one witness may say this man did it or this man said it, another witness equally credible, and present at the time, may have it in his mind that another man did or said it. So, because it is often in the nature of things difficult to individualize a man that does or says a particular matter, the rule is laid down that if they have met with a preconceived purpose to do an unlawful act, all must respond for what each one does and says. That is, as I said, no harsh and arbitrary rule, but a rule in the interests of justice, for the protection of society.

Now, with these preliminary observations, let us come down to the testimony itself. All parties, the defendants and the witnesses for the government, agree that there was a large gathering there,—quite a crowd; and, as Mr. Orr says, there was a "fever of excitement." He used the expression once, "It was the rage;" interpreting that afterwards with the idea that there was an excitement pervading the crowd, which surged backwards and forwards, now to this engine and now to that, and that there was an excited, eager crowd of people there, bent on accomplishing a certain result. They wanted to stop the movement of trains; they did not seek to destroy an engine; they

did not seek to destroy property; they had obviously that respect for the rights of property which made them unwilling to touch an engine, a car, or any of the property of the company for the sake of destroying it; and in that they are to be commended; in that their conduct differs from that which oftentimes is found in movements of this kind; for it is part of the public history of the country, as we all know, that, in what are called strikes, excited men, wicked men, have wrought oftentimes fearful destruction of property.

You will all remember the Pittsburgh riots, years ago, when millions of dollars of property were destroyed. These men, and I say it to their commendation, I do not see from the testimony that they put a finger on a dollar's worth of company's property to destroy it; but they did go there with the intent to prevent this company, whose property is in the hands of the court, from moving its trains,—from attending to its regular business. Of that there can be no question. What the grievances were, what the reasons for the strike were, are obscure. I do not fully understand them. The parties defendant in this case, when they were on the stand themselves, did not seem to have a definite idea of the wrongs that they complained of, or of what their grievances were. If they had any grievances, if there was anything of which they had a right to complain, it is one of the peculiar features of property situated as this is that the court is always open to hear and adjust them; and in one respect this company, whose property is in the hands of the court, has not the freedom which ordinary property owners have. Although owning this railroad, it is not for it to say who shall be employed and who not. The court has taken possession of that property, and any man connected with the administration or management of that road, I do not care who he is, whether he is doing the most humble, common work on the line of that road, has the same right that the receiver himself has, that any creditor of the road has, to come into this court and insist that any grievance which he has against the management of that road shall be considered and passed upon. Ordinarily, you know, when a company has property, it has absolute liberty. It may dismiss whom it pleases, and employ whom it pleases; but when the courts take possession of property in this way, that liberty is abridged, and the company cannot say,—Mr. Jackson, the receiver, cannot say,—“I will discharge all of these men; I will pay them only so much a day; I will require so many hours' work; I will require this and that of them;” for there is no one in the employ of the company but who has the right to come and say to this court, “Mr. Jackson is making an unreasonable requirement; it is more than he has fairly and reasonably a right to require of us;” and the court is bound to listen to that complaint, and to see that justice is done between the receiver and any employe. But this party of strikers, not coming into this court, assumed at that time to try to stop the operation of the road; tried to prevent the engineers from running out the

trains; tried to prevent the train-men from working; and while, as I say, they touched no property to injure it, yet I think there was no one that heard the testimony but felt that that demonstration was made with the intent to overawe these engineers; to make them feel that it was not personally prudent to run those trains; that there was a risk to themselves in attempting to continue the operations of the road there; and that these engineers acted under a reasonable sense of personal danger accruing from the demonstration that was made in their presence.

I have no doubt that some men, who are excessively bold, might have laughed at it, and waited, believing that no personal violence would be used; but men are not all equally bold and courageous; the average man has a feeling that it is his duty to regard his personal safety; we all know that, and we act upon that presumption; and when these men met there in that fever of excitement, when the crowd surged backwards and forwards, from one end of that yard to the other, approaching now this engine and now that, they knew, and every man knows, that that kind of a demonstration was calculated to intimidate; and they knew, and every man knows, that ordinarily prudent men are not going to risk their personal safety when there is nothing to be gained by it. They are going to say, "Well, here is a crowd; they are in excitement here; they pass backwards and forwards through this yard; and though they say we cannot do any violence, we cannot order you to leave, but you had better leave; we request you to leave; you are not going back on us, and we had better quit." Every one understands that these men felt overawed, intimidated, and quit work, not because they wanted to,—some of them, at least,—but because they felt that their personal safety, personal prudence, required them to do it. It would be, as it seems to me, blinding my eyes to obvious facts to say that there was not intimidation. I think these men that were there would themselves feel that I did not respect their good sense, that I did not give them credit for ordinary intelligence, if I should say that that was a mere peaceable gathering of a few men to present a request; and I have come reluctantly to the conclusion that there was an effort, a preconcerted effort, at that time, by a demonstration of force, to overawe these engineers and train-men, and to prevent the receiver from operating the road there.

Coming to that conclusion, there is but one duty that a court may discharge. Courts are organized for the protection of persons and property, and while in the discharge of their duties oftentimes there are unpleasant burdens cast upon them; yet no man is fit to occupy a position as a judge, especially in a court which, like this, has such vast powers and such solemn responsibilities, who can hesitate, whenever a wrong is brought to his attention, to treat it as a wrong and punish accordingly.

I have looked over this testimony to see if I could distinguish in

any way between the conduct of these defendants,—if I could find who were, in the language of some of the witnesses, the ringleaders, the ones that were urging on the others; for it is part of our common knowledge that in movements of this kind the great majority are led by the few; they listen to those who are the leaders. As some of these defendants said, not knowing really what the trouble was, yet because they were led and urged by others, they went into this strike. Now, those who are in the great majority in such a case, who are simply the followers of a few leaders, the court ought to treat very mildly; those who are the ringleaders, those who lead off in any unlawful movement, must expect to be treated as such.

The first one that I shall notice is Mr. Wheeler. For the reasons which I have already indicated, independent of the particular matter which I shall refer to, it seems to me that he must be held responsible with the others. Beyond that is his connection with an engine and cars that went to Poncha, and the setting off of a car there. Mr. Wheeler gives his version of that affair, and, according to that, his thought in what he did was rather to protect the company than otherwise. Well, it is fair to him to give him the benefit of his explanation as to that matter, though I can but think that he must be held responsible generally with the others. But there is a circumstance connected with himself personally which leads me to make a different ruling in his case from the others; certain family matters which I need not mention here, and which seem to justify and require me to treat his case as exceptional. While courts are exacting and sometimes severe, they are never cruel; and, in view of these family matters, Mr. Wheeler will be discharged, on giving his personal recognizance to keep the peace and not interfere with the management of the road by the receiver.

The next case is that of Mr. Murphy. Upon the general considerations that I have given I think that he must be held responsible, and technically, I might say, within the rule of the law heretofore stated, that he must be considered as equally guilty with the others; but as I read the testimony through, notwithstanding one or two matters in which he figured personally, it does not impress me that he can be regarded as a leader, and I shall impose a slight punishment on him. The order will be that he will be committed to the county jail for 10 days.

In respect to Mr. Tyler, I think his conduct shows that he was more of a leader than these other two. I do not see that his conduct was such that he could be called, in the severest sense of the term, one of the leaders. Here was possibly a man who was talking a good deal, yet his conduct does not seem to me to merit the condemnation that Mr. Orr's does, and the order will be in his case that he be committed for 30 days.

In regard to Mr. Orr, he denies one by one, and *in toto*, the specific charges made against him by the several witnesses, or else, where he

admits a part of what was said, he qualifies it by giving his recollection of the conversation. If there were but one witness who made these specific charges against him,—as he appeared very frank in his manner on the witness stand, outspoken, straightforward,—I should feel that in his case the duty which exists of giving the benefit of all doubts to a party charged with wrong, would make me place his conduct along-side that of the others; but there are three or four witnesses testifying to separate matters, and it seems to me I should not be doing justice to take his single denial as against the testimony of these several witnesses. It may be, and I think regard for every man requires me to say, that possibly, in the excitement of that day, having made these remarks or threats, they have passed from his mind, and that he really did not intend, on the witness stand, to state anything other than as he remembered; but these witnesses who speak in reference to what threats he made are too specific, too positive, too clear, for me to doubt that on that day he did make the threats which are charged against him, and those threats are of no trifling nature. I cannot pass over such conduct lightly. I do not know what testimony was adduced before my brother HALLETT in reference to the two cases which he disposed of; but where a party is guilty of no actual injury to property, I think a distinction should be drawn between his case and that of parties who forcibly seize and destroy property. I had occasion the other day, in St. Louis, to go through with matters of this kind at great length, where I felt constrained to impose a milder punishment than my brother TREAT, the district judge, thought the cases warranted; and I did it then on the ground that there was no destruction of property, and that, perhaps, in that case, there was no specific intent to interfere with the property in the hands of the receivers. In this case, without intending to say that six months might not be a proper punishment, yet, as the parties did not do any violence to the property, I think that it would be fair to impose a penalty of only four months on Mr. Orr. I do that partially for this further reason,—and, as, perhaps, some of these gentlemen who are in the court-room are interested in this matter, it will not be out of place for me to add a word.

So far as I am advised, this was the first demonstration of the kind along this road, and the parties engaged in it did no violence to property, for which, as I said, they are to be commended. It seems from the testimony that they were trying to accomplish their purposes without any violence to property, and perhaps some—some certainly, and perhaps all—believing that in what they were doing they were not interfering with the property in the hands of the court, or placing themselves in a position where they could be held liable for contempt. It is fair to every man to believe what he says, unless there is developed on the other side such testimony as compels a disregard of his statements. But this case, in all its features, has developed to these men the fact that where property is in the possession of the

court, the management of that property cannot lightly be trifled with, and the lesson it teaches will not, I think, be forgotten. And while the penalties which I have imposed are not so severe as have been imposed in many cases elsewhere, and indeed here, I want to say in conclusion that no subsequent demonstration of a similar nature anywhere within my jurisdiction, or at least within this state, where these cases have transpired, and where others must take notice of what was done, may expect any such light treatment at my hands. It is the duty of the court to see that property which is put into its hands, or in the hands of its receivers, is absolutely protected, and that nobody, directly or indirectly, interferes with the management of that property. No man is bound to stay a single day in the employment of the receiver appointed by this court, and no man must interfere with the property or with the management of that property so long as it is in the hands of the court; and if there is any subsequent demonstration of a similar nature, I want now to say most kindly, but most emphatically, so that nobody may misunderstand, that any parties who are engaged in it and who are brought before me for contempt, must expect the severest penalty which the law permits. If there is any man, as I said awhile ago, who feels that he is wronged in any way by the receivers appointed by this court, all he has to do is to come and make his grievances known, and they will be heard, and the court will try to do justice by him as well as by the receivers; but no violence, in any way, shape, or manner, will be tolerated in the slightest degree.

FRANK and others v. DENVER & R. G. Ry. Co.

(Circuit Court, D. Colorado. May 22, 1885.)

RECEIVERS—STRIKE.

Complaints of railroad employes considered, and duties of receiver and employes discussed, in regard to management of road.

BREWER, J., (*orally*.) In reference to this matter of the employes of the Denver & Rio Grande, certain gentlemen came before me the other day, with a petition, and I set a day for the hearing of the matters there complained of, which was the day before yesterday. On that day the parties on both sides appeared, and we had quite an amount of testimony taken down, which has been copied by the stenographer. At the same time the complaining parties filed a further statement as to matters to which they wanted to call the attention of the court. I have those two statements before me. I will not take time to read them in detail; but they include substantially these matters. They claim, in the first place, that the wages of the apprentices are not reasonably advanced. Then, in the second place, they say that men em-

ployed in the freight department have been required to do extra work without extra pay. Then, in the third place, they claim that a number of men were discharged on the pretense that there was not work enough for them, when, in fact, there was work, and when, if there was not an abundance of work, the remaining employes were willing to work on shorter time. They also say that the employes in one specific department presented a petition to the officers of the road, asking for the discharge of one of the foremen, Mr. McClellan; and they say here that that foreman was so blasphemous and tyrannical as to unfit him for the position he holds. Well, there are some of these things, frankly, that I think very trivial, and I think, gentlemen, that you will so agree with me when you stop to consider the situation.

Here are 10 young men who came forward to complain that their wages have not been reasonably advanced. They were young men, all the way from 16 to 22 or 23 years of age. Only one of them, according to his own statement, during the time that he had been working for the company, has had his wages reduced, and he was a boy only 16 years of age, whose wages were reduced from \$1.50 to \$1.25 a day, and a boy who, very obviously, was not overly strong. That was the only case of reduction. There was one other whose wages had remained what they were when he started; but the other eight had had a steady increase of wages. I do not mean regularly so much every month or every six months, but their wages had been increased. I asked two or three of them who seemed to be very sore, whether they had tried to get work or higher wages elsewhere. They had not, and did not know whether they could, yet their wages had been increased, while during the past year or more this road has been defaulting in all its interests. It has cost over \$30,000,000 to build this road of 1,300 miles, and the men whose money built it, the men who put their money into the building of this road so as to furnish work and support to-day to the 3,000 or 4,000 men employed along its line, have not during the last year received a dollar. Now, is it not fair and but common justice that they should have something, and that the earnings should not be all turned in one direction to lift up the wages of laboring men? It is not now as it was three or four years ago, when this road was doing a large business and paying interest, when it could afford to increase wages, for its earnings have dropped from 1882 to 1884 over \$800,000.

There is not one of you that if you started a business of your own would not do just as the officers of this company are doing. You start a little establishment for manufacturing, or anything of that kind, and have four or five men working for you. The times get hard and you cannot pay your debts. What would every one of you say to the men who were working for you? You would not say, "Well, now, I will go and increase your wages;" but, "My business is poor, I am making nothing; I am not paying my debts, and I cannot pay you any more wages;" and very likely in many cases you might say, "I will

have to reduce your wages; if you can do better elsewhere, well and good, but if you work for me I cannot pay you as much as I have been doing, because I cannot pay my creditors; I am in debt." Every man wants to pay his debts,—feels that he ought to; and while we call this a corporation, it is nothing but a combination of a great many men who put their property into this one form; and they think, and every man thinks and feels that he ought, so far as he can, to pay his debts, and that it would not be right for him to be extravagant in his living or his expenses when he is in debt. And it is not a matter, either, in which the present officers of the company, the men who are managing the road to-day, have any discretion. It is not for them to say, "We will increase wages and build cars and extend the track, and so give employment to a great many." The court has said to them, "In taking possession of this road you do so because it is a defaulting road; it does not pay its interest or its debts, and now, gentlemen, we put you in charge of this road and you have got to run it just as economically as you can. You must not expend a dollar in extending the road; you must not expend a dollar more than is necessary in keeping up the road;" and if it should appear that they were going on, I will not say extravagantly, but even carelessly, as owners of roads sometimes do, why then the court should step in and tell them: "You forget that this road does not pay its debts; that it is defaulting, and it has not the means, and you must stop." That which every man has to do in his own business, those gentlemen who are placed in charge of this road have to do in the management of this road; so they could not do what, perhaps, many of them would like to do,—increase wages, increase their laboring force. They have got to keep within the limits of their instructions.

I will not go over the matter that I went over the other day, where I said to you that the employe was at liberty and the employer was also at liberty. Whatever laws may exist by and by, to-day, in this country, the employe is free to go or free to stay, and the employer is free to discharge him. That is the law in this country. The courts do not make the laws, but take them as the legislators make them. The parties may bind themselves by contract, but where they have made no contract for a stipulated time, the employe may leave when he wishes and the employer may discharge when he pleases. So that if it had been simply a mere naked question of law that you put to me in regard to this matter, I would have to say to you, in the fewest words, that the law is that the employer can discharge, and that in regard to the matter of wages and discharge the management of this road had simply exercised their legal rights; but I did not care to put it upon that simple proposition of law. I wanted to talk about the particular matters in which you felt you were wronged. I have no more to say in reference to this matter of wages. And the same thing applies to the extra work in the freight department. It is true, the witnesses differ a little; some thought they were never detained

longer than 15 or 20 minutes; others thought they were detained till 7 or 7:30 P. M. Several of them said that part of the day there was very little work to do; the freight coming in late in the afternoon and piling up work then, while right after dinner there was little to do and they were comparatively idle. Be that as it may, accept it just as broadly as any of these men put it, that they were called upon at times to work late at night, that they had to get there at 7 in the morning, be around all day, and were detained in the evening and got nothing extra for it,—take it as broadly and strongly as any one has put it,—well, the first thing that comes to any man's mind is, "Why do you stay there if the work is so hard? If there is work all around here and you can get a better or easier place, why don't you take it?" We all know the reason. It casts no reflection upon them. They stay there because they think there is a permanence about the work and perhaps for other reasons. I do not know what they all are, but they prefer to stay, even with the inconvenience of waiting one or two hours after 6 o'clock.

But there is back of that another thing. A railroad, of all business in the world, has to be prompt in all things. Their customers are the most urgent of all men. If any man goes to ship a bill of goods he wants to ship it right away; and if he has an invoice of a bill of goods coming from the east, he wants those goods delivered the moment they come. If a railroad manager said, "Well, there is no pressure, let it go over until to-morrow or next day," he would be receiving constant complaints; the business of the road would be lost. If a man wants things shipped, he will not have dealings with a road unless it is attentive and prompt. In courts there are many lawsuits tried where roads are sued for damages, and we have to lay down the rule every time that the highest diligence and the utmost care are required on the part of these railroads. If there is neglect of any kind,—the slightest neglect or delay,—the road has to respond for it; and it is one of those urgent, pressing, imperative occupations which inevitably and universally require that those in charge shall push things, shall see that the work is gotten out of the way as quickly and rapidly as possible, and that the utmost care is paid in every department of the business. If the officers did not do this they would be brought up here day after day with a suit for damages, or a suit on account of delay in transportation, or something of that kind.

There is no occupation in the country to-day where there is more of what you may call almost a military necessity, and where there is any more imperative demand for that quick, pushing, sharp way of doing things. You and I, when we travel, we want everything provided for us and in the best condition. If we do not have it, we complain. If we ship goods, we want those goods delivered in promptness, in the quickest time. If they are not, we make complaint. And so these men that are managers and officers of a railroad corporation have got to face all the while this demand of the traveling and shipping

public, for best accommodations, the utmost speed, and absolute exactness, in all their transactions. That being so, I do not know of any large organization of business, any aggregation of labor, where there is a more imperative demand for almost military law and discipline; it has to be exact all the way through, from the first to the last man. I do not know how many employes there are on this road. There are 1,300 miles of road, and there must be four or five thousand men. The neglect of any one of them would bring large damages upon the road. When business is blocked up, the company must have men that they can depend on, and that do not stand upon the question of half an hour or three-quarters of an hour. If the work is there it must be done, and the men must be there to do it. And when I think of such an organization, with its imperative needs, I am frank to say to you, gentlemen, that it seems to me that it was trifling a little to be making the point that you were sometimes called upon to stay an hour or so to finish work. That was not true in the machine-shops, where there was regular work; the only complaint was in the freight department, and I can now think of only one thing which reminds me of the conduct of those men who objected to work after 6 o'clock. During the war, when Gen. Price's army marched up through Missouri to the borders of Kansas, the Kansas militia was called out, and when we got to the state line between Kansas and Missouri, there were a dozen or 15 men in one regiment who refused to go over the state line; they thought there was a limit beyond which their patriotism did not go; they would go to the borders of the state line, but no further; and, although Gen. Price was within six or eight miles of that line, they would not go beyond it,—they were particular about that line.

The other matter which I have considered is of a different nature, and that is in regard to Mr. McClellan. The employes under him presented a petition to Mr. Sample first, I believe, and afterwards to Mr. Jackson, the receiver, and they there represented that Mr. McClellan was overbearing and profane; and those employes have made the same complaint here. They say that Mr. Jackson kept the petition a few days, and then reported that he had examined, and did not think the charges were sustained; but admitting that Mr. McClellan might swear occasionally; that in so doing he was not doing an uncommon thing, and that he (Mr. Jackson) did not find enough reason for making the discharge. Now, they bring the same matter up here. I could very fairly say, and I presume a great many judges would, that we have appointed a receiver in whom we have confidence, and that when these employes went to him, and he took the matter up and examined it, and was satisfied that Mr. McClellan was an efficient, and not a tyrannical and unfit, foreman, that his decision should be final, because he is in a position where he can get at all the facts. But I did not care to put it upon that ground, and so I told these gentlemen to make a statement of all their complaints, which they did, and then I heard

the statements of Mr. McClellan, Mr. Groves, Mr. Sample, and Mr. Jackson. Doubtless Mr. McClellan does swear,—many men do,—and yet it seemed to me it could not be that he was one of those terribly profane men, for out of those various witnesses three or four said they never heard him swear but once, when he said to one of them, "What in hell are you doing?" or something of that kind; and one man, who was there several months, says he never heard him swear at all.

If you take out the testimony of Mr. Culmsee and one or two other witnesses, the evidence of the balance of the employes who were examined would show that Mr. McClellan did not swear half as much as perhaps nine-tenths of the people right here in this court-room. I do not mean to approve of swearing. I do not mean to indorse it at all; but I have seen some very good men who would swear most terribly. I could not but think, when I heard those gentlemen tell their stories, that Mr. McClellan was not very profane; and while he doubtless does swear occasionally, it is not very common, or else some of these men other than Mr. Culmsee and one or two others would have recollections thereof. Outside of three witnesses, the balance of them either say they never heard him swear, or that they remember only one or two instances, and some of them have been there for two or three years. They say he is tyrannical. I guess he is a driving man. I take it from the testimony on both sides that he is a pushing man. He says himself he tries to get a full day's work, and it is very natural. I can believe, without any hesitation, that a man who is an earnest, pushing man, trying to get all the work that he can out of a large body of men, sometimes makes mistakes. I never saw a man that did not do it; and I have no doubt that it is true, as some of you feel, that at times he may have been, in this or that matter, unjust, so far as you were personally concerned, and that you had really done all that you ought to have done. But such mistakes as that will always happen where a man is earnest, energetic, and driving. If he is a fair man, if he is a man that tries to do right towards his employer and the employe, although he may be one of those driving, resolute, pushing men, he is not a man to be discharged from any occupation. Upon the testimony of these complaining witnesses I could not but think that that was all that could be fairly said against him. On the other hand, there were Mr. Jackson, Mr. Sample, and Mr. Groves, the last two being so situated that they must know the facts of his conduct and the character of the man, and two or three foremen who were about there, who all testified that he was an efficient, faithful, honest, fair man. Ought he to have been removed? I think not.

It is fair to say that there is a matter back of that. Prior to this petition, prior to the discharge of any of those 10 men, it seems there was some trouble with an employe of the name of Ash, who was discharged, and a committee called on the officers in regard to the mat-

ter, not a committee of the employes exclusively, but with one outsider at least. They went to see Mr. Groves and said to him that there was an organization which had brought larger corporations than the Rio Grande to terms, and that they intended to bring this road to terms. That was the first demonstration from these employes, a demonstration aided by outsiders. I do not mean to say that one of the employes made the above threat; it was from that one of the committee who was not an employe; but they were all there together. Now, let a number of men—employes—go with such a threat as that, if they afterwards come along with a petition of this nature, don't you know that every man will instinctively feel that it is simply an effort to carry out that threat, and very naturally will not feel as kindly towards it as he otherwise would, because, as I said a while ago, any employer expects his employes to be loyal to him, and not obeying the orders or respecting the wishes of any other person or organization; and there is no business which requires the same loyalty that a railroad does. Only by it can the management of a large railroad guard against accident and against being mulcted in damages in the courts; and so when these men came, after making that threat, to the officers of the road with this petition, I do not wonder that these officers felt, before they had made any inquiry, that this was simply a movement in pursuance of that threat; especially as Mr. McClellan has been acting as foreman for about five years to the apparent satisfaction and with the confidence of the employes under him,—only one prior complaint having been made against him during all that time. If it was an attempt, by any organization outside of the management of this road, to control it, it was the duty of the officers of the road to resist it. The road cannot be run by outsiders. The management of the road must have absolute control. There is too much at risk. It is not like keeping a grocery store; it is not even like running a manufacturing establishment, where the employers, the managers, can take many chances. In the management of a railroad you can take no chances. You must have a corps of employes who are loyal to the road, who are looking after its interests ungrudgingly and without any divided allegiance. The moment it comes that a corps of employes in this shop or in that shop, or the train-men on the road, are wanting in loyalty to the road, the road had better stop; it is not safe to run it; and the officers of the road owe it to themselves,—owe it to the court that has appointed them,—to see that they have no man in that employ who is not absolutely loyal to the interests of the road.

I may have omitted some minor matters, but I believe I have spoken all that I desire about those grievances. I am frank to say to you that no one of them impressed me or arrested my attention, except that in reference to Mr. McClellan. So I made inquiries of all the men that were here, and heard Mr. Sample and the officers of the road who were likely to know of Mr. McClellan's efficiency; I had them subpoenaed to come, and they came, and I heard their testi-

mony. As I said, that was the only one of their grievances which, after you, gentlemen, had told your story, I felt was sufficient to arrest my attention; and after hearing all the testimony in the matter, I must say that I think the company have a most efficient and capable, and not an unjust, foreman.

Of course, you know from what I have said that I think you have made a mistake. I think you did not realize the fact that that road had to reduce its working force to get itself out of debt and out of the courts. I think, also, that some of you are embittered against the road; that you feel hostile to it. That cropped out in the testimony before me from several witnesses. Men whose feelings towards the road are vicious, who feel ugly towards it, such men it would not be safe for the road to have. I do not suppose that all of the employes came before me, but only such as were chosen or selected, or desired to come; and of those who came, some seem to me to be very fair men. Well, I think they made a mistake, yet I do not think they were acting viciously. I do not think to-day that they feel ugly towards the road; I think they would be perfectly loyal to its interests; I think they are fair men. I do not know how much additional force, if any, the officers need in the shops and about the depot. If they do not need any, why that is the end of it. If they can get along with what laboring force they have, they ought to do it until they get out of debt, or at least until they have paid some of their indebtedness.

But I want to say to Mr. Jackson, right here, that I do not think you ought to make, I should not want you to make, the mere going out of these employes from work on the fourth of May a reason for not re-employing them. I do not know how many men you may need,—I do not know how many left, for that matter,—but I think it would be the thing for you to do, so far as you need men, instead of going away from here, sending elsewhere for laborers or mechanics,—I know you can get them all over the land; there are plenty who would like to come, for work is scarce,—instead of doing that, I think what you ought to do is, so far as you need mechanics and laborers of any kind, to take such of these as are the fairest and best men; men who have not been ugly or vicious. Of course, there are men—I saw it right here on the witness stand, and I saw it upstairs—that it would not be safe to take into your employment. I do not know those men; I cannot make any selection. The court has placed you in charge of that property. You have the responsibility, and you must make the selection. You have to employ men, and there is a responsibility resting upon you for employing good men. Legally, the responsibility is with you; the court places it with you; and, in the nature of things, the court could not make any selection. So the responsibility of selection is cast upon you.

But I do want to say, and I want to say it to you in the presence of these men, that I do not want to see you shut the door down absolutely, and say: "I won't take any man that went out on the fourth

of May." I said to them that they were mistaken, and I said, and I say it again, that I think some of them are bad men; that they went out viciously, and feel ugly towards the road, and ought never to be in its employ. But at the same time, I think some of the men simply made a mistake; that they are fair men, and mean to do what is right; that they did as multitudes do, act with their associates, go because they went, and, having simply done that, I think that you should not lift up the barriers against them. If they want to work, and if you have work for them, then such men as you select I should be glad to see you take back.

I do not know that I can say anything more in reference to this matter. Ever since I have been here, for eight days, I have had the troubles of this strike, and of the employes of the road, before me in one shape or another. It has been an embarrassing, difficult question. I have tried to make it plain to you that the laws must be enforced, that the employer is a free man, as well as the employe; that there are rights which the law guaranties, and will enforce, and I have had to punish some who I thought were intimidating, trying to coerce the management of the road. I did it reluctantly; I did it firmly. And I can only say in conclusion, for I suppose this is the last of this matter that will come before me, I have tried to be perfectly fair and frank with you all. You are all comparative strangers to me. I never was here holding court but once before. The attorneys and citizens here are all comparative strangers. I had no feeling one way or the other. I heard every man that had anything to say, and I have tried to decide each matter as under the law it ought to have been decided.

MAURITZ v. NEW YORK, L. E. & W. R. Co.¹

(Circuit Court, E. D. Wisconsin. November 28, 1884.)

1. CARRIERS OF PASSENGERS — LIMITING LIABILITY FOR LOSS OF BAGGAGE — PRINTED CONDITIONS ON TICKET.

The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried, unless the passenger's attention is called to it when purchasing the ticket, or unless the circumstances of the transaction are such as to make the omission of the passenger to read the conditions on the ticket negligence *per se*.

2. SAME—PASSENGER UNABLE TO READ—EXPLANATION BY AGENT.

Where the passenger is unable to read, and no explanation is made by the agent of the company selling the ticket, he is not bound by the special terms and conditions printed on such ticket.

3. SAME—CONNECTING LINES—DUTY AND LIABILITY—SPECIAL CONTRACT.

Where a railroad company, whose road connects with other roads, receives baggage for transportation beyond the termination of its own line, it is only

¹Reported by Robertson Howard, Esq., of the St. Paul bar.

bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier; but any one of the companies may agree that its liability shall extend over the whole route.

4. SAME—EVIDENCE OF SPECIAL CONTRACT.

The sale of a through ticket is a fact that may be taken into account in determining what the undertaking of the company issuing the ticket was; but such facts and circumstances growing out of the negotiations of the parties, or otherwise arising, ought to be shown, as make it evident that it was the understanding and agreement on both sides that the company selling the ticket undertook to be responsible for the safety of the baggage over connecting lines through to its ultimate destination.

5. SAME—DAMAGES—RECOVERY LIMITED TO VALUE OF BAGGAGE.

A passenger, in the absence of special contract, will only be entitled to recover the value for use of such articles lost, while in transit, as properly constitute baggage; and what articles come within the rule is to be determined according to circumstances.

At Law.

Wyman & Roehr, for plaintiff.

Finches, Lynde & Miller, for defendant.

DYER, J., (*charging jury*.) This is a suit to recover from the defendant, the New York, Lake Erie & Western Railroad Company, the value of certain lost baggage shipped from New York in June, 1882, over the defendant's line of road and destined for Weyauwega, Wisconsin. Many of the facts relating to the shipment and transportation of the baggage in question are undisputed. It seems that the plaintiff and his family and one Schelongowsky were a party of seven emigrants from Germany, who, on their arrival in New York, desired to obtain transportation for themselves and their luggage to Weyauwega, their point of ultimate destination. To that end the plaintiff's daughter applied to an agent of the defendant, at his office in New York, for passage tickets over the defendant's railroad and connecting lines of road, by means of which they and their baggage should be carried to Wisconsin. As a result of negotiations with the agent, the plaintiff, by his said daughter, purchased three third-class coupon tickets for each person in the party, one of which was a ticket from New York to Chicago over the defendant's road to Salamanca, thence over the New York, Pennsylvania & Ohio Railroad to Mansfield, and thence over the Pittsburgh, Fort Wayne & Chicago Railroad to Chicago. The second ticket in the series was one from Chicago to Milwaukee, over the Chicago, Milwaukee & St. Paul Railway, and the third was a ticket from Milwaukee to Weyauwega, over the Wisconsin Central Railroad. For all the tickets the agent was paid \$129.50. These tickets having been procured, the plaintiff and his companions then proceeded to Castle Garden, where their baggage was deposited, and there received checks for the same over the defendant's road and connecting roads to Chicago. The baggage thus checked, including the box in question, was then carried by boat across the river to Jersey City, and there seems to be no doubt that it was placed on the train upon which the plaintiff and his family took passage for Chicago.

When near Chicago, and while yet on board the cars, the plaintiff and his associates surrendered their checks to a railroad official, taking in exchange the checks furnished by that official; and after their arrival at the station, and while they were in the depot waiting-room, they exchanged those checks for six joint checks of the Chicago, Milwaukee & St. Paul and Wisconsin Central roads; these checks being given for the carriage of their luggage from Chicago to Weyauwega. It appears that all of the baggage in due time arrived at Weyauwega, except the box in question, the loss of which has occasioned this suit. It seems that the plaintiff and his companions did not see any of their baggage in Chicago, but the undisputed evidence establishes the fact that it all arrived at the Chicago depot; and that the loss occurred after that time appears quite evident from the fact that all the other pieces of baggage rechecked in the manner before stated, arrived safely at Weyauwega. All of the passage tickets received in New York were labeled, "New York, Lake Erie & Western Railroad Company;" and upon all of them was printed in the English language the following:

"Subject to the following conditions and regulations: In consideration of the reduced fare at which this ticket is sold, it will be valid only for one continuous third-class passage, if used to destination before midnight of the date canceled on the margin of this contract. And this ticket will be good only when officially stamped and dated, and upon presentation with checks attached. The checks belonging to this ticket will not be received if detached, nor will this ticket be recognized for passage if more than one date is punched out. In selling this ticket for passage over other roads this company acts only as agent for them, and assumes no responsibility beyond its own line. None of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding \$50 in value. No stop-over allowed."

Each of the tickets stated on its face that it was a "third-class ticket, good for one continuous third-class passage;" the first of the series covering such passage from New York to Chicago; the second, from Chicago to Milwaukee, and the third, from Milwaukee to Weyauwega. The coupons respectively named the different lines of road on which the tickets were receivable, and each coupon was indorsed: "Special ticket; subject to conditions of contract."

The uncontradicted testimony on the part of the plaintiff is that neither the plaintiff, nor his daughter who bought the tickets, nor any of their party, could speak, read, or understand the English language at the time the tickets were purchased; and there is no proof that the agent from whom the tickets were purchased, read or explained to them, or called their attention to the conditions printed on the tickets. The theory upon which the plaintiff seeks to recover in this action is that he made an express verbal contract with the agent of the defendant company for the transportation of himself and his fellow travelers and their luggage from New York to Weyauwega; by which alleged contract he claims the defendant undertook to furnish safe carriage for passengers and baggage, not only over defendant's road,

but over the connecting lines named, to the place of ultimate destination; that it was one entire through contract, creating a liability on the part of the defendant for the safe transportation of baggage as well over the Chicago, Milwaukee & St. Paul and Wisconsin Central roads as over the road of the defendant company, and therefore that the defendant is liable for the loss of the box in question, although that loss may not have occurred on its road.

The contention of the defendant is—*First*, that it did not make such a contract as is alleged by the plaintiff, and that the evidence on the part of the plaintiff does not establish such a contract; *secondly*, that the contract between the parties was expressed on the face of the tickets; that it consisted of the conditions and limitations printed thereon, and that the defendant's liability for baggage was therein limited to loss occurring on its own line, and to wearing apparel not exceeding \$50 in value. The issuance of the passage tickets mentioned, their acceptance by the plaintiff, the omission of the defendant's agent to explain to the plaintiff or his daughter who purchased them what was printed on their face, and the inability of the parties who obtained the tickets to read the statements and conditions printed thereon, and their consequent ignorance of the same, being undisputed facts in the case, there seems to be nothing to submit to the jury upon the question whether or not the conditions and regulations expressed on the face of the tickets constituted the contract between the parties. As the question is here presented, it is one of law to be determined by the court.

There are many reported cases in which it has been held that, where the shipper of property over a line of railroad receives from the carrier a bill of lading containing limitations upon its common-law liability, such bill of lading constitutes the contract of shipment, binding upon the shipper, and that he cannot thereafter avoid the limitations of liability expressed therein in favor of the carrier, by pleading ignorance of the contents of the bill of lading. This is the principle invoked by the defendant in support of its contention that the tickets issued in this case with the conditions and qualifications of liability thereon expressed, constituted the contract under which the baggage in question was carried. As to railroad passage tickets, there are other decisions which hold that the liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried, unless the passenger's attention is called to it when purchasing the ticket, or unless the circumstances of the transaction are such as to make the omission of the passenger to read the conditions on the ticket negligence, *per se*, that is, such as to make the omission of itself negligence. Thus a distinction is taken between the case of a shipper receiving a bill of lading on account of his shipment, and a traveler receiving a passage ticket for the carriage of himself and baggage over the carrier's road. I think

there is ground for the distinction. In the one case the shipper is supposed to understand and know that according to commercial usage a bill of lading is essential to the regular and safe transportation of property which is shipped and carried as freight, and that of necessity it must constitute the contract of shipment and carriage. In the other case, the ticket is ordinarily regarded as a mere voucher for the money paid for it, a token or evidence of the purchaser's right to be carried, or to have his baggage carried a certain distance. And where, from the undisputed circumstances of the transaction, it is apparent that the passenger rightfully took the ticket as a mere receipt or voucher evidencing his right to be carried, and enabling him to follow and identify his property, and without any notice that it embodied the terms of a special contract, or was intended to subserve any other purpose than that of a voucher, it would seem that his omission to read the paper ought not to be held negligence, and that, as matter of law, he should not be held bound by limitations of which he had no knowledge, and to which, therefore, he did not assent, especially where, as in this case, the purchaser was unable to read the English language, and was ignorant not only of the printed matter on the ticket, but of the ways of business in this country.

Since the decisions of the courts on this subject are not entirely harmonious, I rule upon this question not without some hesitation; but for the purposes of this trial, and subject to review by the full bench, if a review shall become necessary, I instruct you upon the undisputed facts, as developed on this branch of the case, that the plaintiff was not bound by the special terms and conditions printed on these tickets; and that whatever legal rights he may have acquired by his purchase of the tickets are unaffected by those conditions. The question is then presented, did the agent of the defendant company, by express verbal contract, undertake, in defendant's behalf, with the person who purchased these tickets, to safely carry the baggage in question to Weyauwega,—a point confessedly beyond the termination of the defendant's line,—and there deliver it to the owners? The law relating to this branch of the case, at least in the federal courts, is this: If a railroad company, whose road connects with other roads, receives goods for transportation beyond the termination of its own line, its duty is to deliver safely the goods to the next connecting line,—the next carrier on the route beyond. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. Each road confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier; but any one of the companies may agree that its liability shall extend over the whole route. In the absence of a special agreement to that effect, such liability will not attach. *Myrick v. Michigan Cent. R. Co.* 107 U. S. 106; S. C. 1 Sup. Ct. Rep. 425. If, there-
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fore, the defendant in this case, the New York, Lake Erie & Western Railroad Company, carried the baggage in question safely to Chicago and there delivered it to the next carrier in the line, the Chicago, Milwaukee & St. Paul Railway Company, then it performed its whole duty, unless it specially agreed with the owners of the baggage in New York that it would carry the baggage through, or would undertake or be responsible for its carriage through to its final destination. Did the defendant so contract with the owners of this baggage? If it did not, then it performed its whole duty if it delivered the property safely to the next carrier in Chicago.

Now, the question of fact for you to determine is, did the defendant make such a special agreement with these parties when they purchased their tickets? Such an agreement ought not to be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. If, for example, I go to the agent of a railroad company in New York, and ask him if he can sell me tickets for myself and baggage over his line of road and other connecting lines to Ashland, Wisconsin, and he says he can, and he sells me such tickets, and that is all there is of the transaction, I think that would not be sufficient of itself to establish a contract on the part of the New York company for the safe carriage of my baggage beyond its own line. Of course, the sale of through tickets is a fact that may be taken into account in determining what the undertaking of the company issuing the tickets is; but such facts and circumstances growing out of the negotiations of the parties, or otherwise arising, ought to be shown as disclosing an understanding and agreement on both sides that the company selling the tickets undertook to be responsible for the safety of the baggage over other lines of road than its own through to its ultimate destination. Now, in view of what transpired between these parties and the agent in New York, in view of all the facts and circumstances attending the purchase of the tickets, did or did not the defendant so undertake and agree? If you find that such was the agreement or undertaking of the defendant, then your verdict should be for the plaintiff. If you do not so find, then your verdict should be in favor of the defendant.

If you should find for the plaintiff, the next question to be determined is, what is the extent of the defendant's liability? For the loss of what goods is the plaintiff entitled to be compensated, if entitled to recover at all? The box in question contained a variety of articles, all of which have been full enumerated by the witness testifying on the subject, and which at the time of the loss were owned by different persons,—some by the plaintiff, others by different members of his family, and still others by Schelongowsky. The plaintiff has produced in evidence an assignment to himself from the other parties in interest of all claims and rights of action accruing to them on account of the loss of such of the enumerated articles as belonged to them respectively. I do not understand the validity of this as-

signment to be questioned, and so the plaintiff stands here as the sole claimant for the entire loss.

The plaintiff's claim must be limited to baggage. But the question is, what is baggage? The rule on this subject can only be stated in general terms. The question what articles come within the rule is to be determined by the jury according to the circumstances of the case. Baggage, of course, includes wearing apparel, and this is not limited to such apparel only as the traveler must necessarily use on his journey. Regard being had to the condition in life of these parties, the plaintiff may recover—if entitled to recover at all—for the loss of all such wearing apparel as these people had provided for their personal use, and as it would be necessary or reasonable for them to use after their arrival and settlement in this country. And so I think that cloth not yet made into garments, but which they may have procured for manufacture into wearing apparel, and which they intended to make such use of, to a reasonable amount, may properly be included as part and parcel of their wearing apparel. So, too, these parties had the right to carry as baggage such jewelry and personal ornaments as were appropriate to their wardrobe, rank, and social position, but no further. As to bedding and bed furnishings not intended for use on the journey,—curtains, table-cloths and covers, books, pictures, and albums,—they come under the head of household goods, and not personal baggage, and cannot be recovered for, and must be excluded from your consideration, unless you find that the agent of the defendant company, when he sold the tickets, was informed or understood that the baggage which was to be carried with the passengers included articles of this character. Of course, if the defendant was informed that this box contained household goods as well as wearing apparel, or had good reason to understand and know that such was the fact, and then consented to accept the property as baggage under check, if liable at all, it is liable therefor the same as for wearing apparel, otherwise not. So, too, the painter's utensils and drawings, and the tailor's utensils enumerated in the list of articles lost, cannot be included as baggage; and for the loss of this property the plaintiff is not entitled to recover unless it is made to appear that the defendant knew or understood that such articles were in the box, and accepted them as baggage.

If your conclusion shall be that under the evidence the plaintiff is entitled to recover, you will consider this question of what constituted the baggage of these parties with care, and within the limitations I have stated; and in determining the amount of the recovery, you will ascertain what was the fair and reasonable value of the articles for which the plaintiff should be compensated. This value will depend upon the age and character of the articles, and the use for which they were intended. Of course the question is not what they could have been sold for in money, but what was their fair and reasonable value for use to the parties who owned them at the time of their loss.

The jury rendered a verdict for plaintiff, and on motion for a new trial, argued before the circuit and district judges, the foregoing instructions to the jury were approved.

CONDITIONS ON RAILWAY TICKETS OR CHECKS. It is now well settled that a railway company or other common carrier may, by special contract, limit its liability for the safety of persons and property intrusted to it for carriage, except for injuries caused by its own or its servants' negligence. In a few jurisdictions, like, for example, New York, its liability even for negligence may be limited. The general, though not the universal, rule is that the liability of a common carrier may be limited only by contract, and the question, in cases where limitation of liability is set up as a defense to an action for damages for injury to persons or property, is whether such contract has been made. This is usually determined by evidence showing acts of the passenger; such as, among other things, accepting a ticket for his passage or a check for his baggage, upon which is printed some condition or limitation of liability.

CASES WHEREIN THE LIABILITY WAS HELD LIMITED. In some cases the courts have had little difficulty in affirmatively answering the question whether a contract limiting liability was assented to. In *Shaw v. York & N. M. R. Co.*¹ it was decided that the shipper of horses is bound by a limitation of liability printed on the ticket for their transportation.² In *Steers v. Liverpool, etc., Steam-ship Co.*³ the court sustained the limitation of liability printed upon a ticket issued for a passage across the ocean in a steam-ship. The court considered the purchase of a steam-ship ticket a matter of more deliberation and care than the purchase of a ticket for railway transportation, and that the passenger buying the steam-ship ticket might be presumed to have read its conditions, and to have consented, so as to make them part of the contract of transportation. From *Van Toll v. Southeastern R. Co.*⁴ it would appear that a distinction exists between carriers and warehousemen in regard to limiting liability by notice on the back of a ticket given for baggage stored with them. The plaintiff, a passenger by the Southeastern Railway, on arriving at the terminus at London bridge, deposited in the cloak-room there a bag containing wearing apparel and jewelry to a value considerably exceeding £10, receiving as a voucher a ticket, on the back of which was printed a notice that the company would "not be responsible for any package exceeding the value of £10." A similar notice printed in large characters was posted in the office, but plaintiff swore that she did not see it. She was not asked whether she had seen the notice on the back of the ticket, but she produced it when she applied for the bag, which had part of its contents abstracted while in custody of defendants. It was held that the company having received the deposit, not as carriers, but as ordinary bailees, upon the terms contained in the printed notice, (which plaintiff, having the means of ascertaining, must be taken to have consented to be bound by,) was not responsible for the loss. While a distinction between warehousemen and carriers is suggested, the opinions of the judges appear to rest more upon the fact of actual knowledge of the notice and assent thereto by plaintiff. In *Zunz v. Southeastern Ry. Co.*⁵ the plaintiff took a ticket of the Southeastern Railway Company to be conveyed as a passenger from London to Paris, on which was printed "The Southeastern Railway Company is not responsible for loss or detention of or injury to baggage of the passenger traveling by this

¹ 6 Ry. Cases, 87.

² See, also, *Austin v. Manchester R. Co.*
10 C. B. 454.

³ 57 N. Y. 1.

⁴ 104 E. C. L. 75, (12 C. B. N. S. 75.)

⁵ L. R. 4 Q. B. 539.

through ticket, except while the passenger is traveling by the Southeastern Railway Company's trains or boats." The plaintiff did not sign this memorandum, and his portmanteau was lost between Calais and Paris on a French railway. Held, that the company was protected by the condition on the ticket. COCKBURN, C. J., said: "However it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print upon the ticket, which he only gets at the last moment after he has paid his money, and when, nine times out of ten, he is hustled out of the place at which he stands to get his ticket by the next comer; however hard it may appear that a man shall be bound by conditions which he receives in such a manner, and, moreover, when he believes that he has made a contract binding upon the company to take him, subject to the ordinary conditions of the general contract, to the place to which he desires to be conveyed; still, we are bound, on the authorities, to hold that when a man takes a ticket with conditions on it he must be presumed to know the contents of it, and must be bound by them." But this case appears to be overruled by a subsequent case,¹ wherein the lord chancellor declared that he was unable to find the authorities relied upon by Chief Justice COCKBURN.

PASSES. The acceptance of a pass, indorsed, "The person accepting this free ticket assumes all risks, etc., and expressly agrees, etc.," forms a contract on the part of the passenger with the company. "It seems necessary," said the court, "that the word 'agrees' means the concurrence of two parties, and that the act of acceptance binds the acceptor as fully as his hand and seal would."² "Applying for a pass or free ticket, taking it, and having it in his possession some six or eight hours before the starting of the train in which he was to go, and having his attention expressly called to its terms, taken in connection with the fact found by the jury that he was at the time of the accident actually riding on this ticket, if not conclusive as a legal presumption, would at least be evidence that he assented to the terms indorsed upon the ticket, from which a jury would be authorized to imply such assent."³

COMMUTATION TICKETS—REGULATIONS. The courts have also found little difficulty in inferring assent to the conditions printed upon the ticket, where such conditions were not limitations of liability, but reasonable regulations intended to govern the conduct of the passenger, and where the ticket, instead of being for a single passage, was a season or a commutation ticket; thus a passenger purchased a "season ticket" entitling him to transportation for a certain time between two points on the defendant's railroad at a considerable reduction from the regular rate of fare. Upon the ticket were indorsed the following conditions: "This ticket is not transferable, nor will any allowance be made to the within-named in case it may not be used for the whole time for which it was issued. It is subject to inspection at any time by the conductor; a refusal to comply will necessitate collection of full fare each time. It is good only for a continuous passage between the points named. If lost or mislaid, it will not be replaced by the company. The holder will please return when renewing." Upon the face of the ticket the words "for conditions see other side" were printed in small capitals. Plaintiff, having lost his ticket, refused to pay fare, and was accordingly ejected from the train. It was held (1) that plaintiff was bound to know the conditions, and the law would presume that he did so. *Semble*, that he would be bound to inform himself of the regulations of the company, even if not indorsed on the ticket. (2) That even if actual notice to him were necessary, the conditions in this case were printed in a sufficiently conspicuous manner to have

¹ Henderson v. Stevenson, L. R. 2 Sc. & Div. 470.

² Wells v. New York Cent. R. Co. 24 N. Y. 183.

³ Perkins v. New York Cent. R. Co. 24 N. Y. 202.

attracted the attention of a man of ordinary prudence. (3) That the conditions were lawful, reasonable, and proper regulations, and not an attempt to limit the liability of the defendants as common carriers. (4) And that plaintiff was therefore excluded from the train and cannot recover.¹

A passenger by railway upon a commutation coupon ticket, conditioned to be shown to the conductor on every trip, and to be void if the coupons were detached by any other person than the conductor, was proceeding to detach a coupon himself, and being warned by the conductor that he would not accept the coupon if he did so, persisted, offered the conductor the coupon, refused to show the ticket, and profanely dared the conductor to put him off. It was decided that this justified the conductor in ejecting him, and that the passenger's subsequent tender of the ticket and detached coupon before the ejection was complete, but in an insulting, profane, and boisterous manner, would not have restored the passenger's right to complete the journey.²

Where a ticket had upon it a condition that it was to be "used on or before" the twenty-sixth of September, and was presented and accepted on that day, but after the expiration of the 26th, the journey not being ended, the passenger was ejected for not having a proper ticket, it was held that the ejection was wrongful. When the ticket was presented on the 26th, it was "used," and passenger was entitled to ride to the end of his journey.³ Assent has also been inferred from acceptance of a receipt given by a mercantile agency for an account presented to them, and left with them for collection.⁴ But where a non-transferable ticket contained a condition that, "I failing to comply with this agreement, either of these companies may refuse to accept this ticket," it was held that this did not give the conductor the right to take the ticket up, only to refuse to receive it for passage.⁵

In all the foregoing cases the acceptance of a receipt or a ticket was a matter of some deliberation, wherein the acceptor had ample time to ascertain the nature of the contract as expressed on the ticket accepted.

CASES WHEREIN THE LIABILITY WAS HELD NOT LIMITED. The general principle of law is well established that a ticket for passage upon a railroad car or a steam-boat does not of itself create a contract between the carrier and the passenger. Such tickets are rather tokens or vouchers that passengers have paid their fare, and are entitled to seats in the car or berths in the steam-boat. As such they are to be surrendered when the passenger's right to the seat or berth is recognized.⁶ In this respect tickets differ from bills of lading, which are well-recognized commercial contracts, and known to be such by all who receive them. Therefore it is that persons receiving bills of lading and other similar commercial instruments are conclusively presumed to know that they contain the terms upon which the property is to be carried, and to have assented thereto.⁷ But there is no such conclusive presumption as to tickets. The question as to the character in which the paper is received is to be determined by all the surrounding circumstances. It is to be determined by the nature of the transaction, and not by the fact that the words "domestic bill of lading" or some such phrase may be printed on the ticket.⁸ By these

¹ *Cresson v. Philadelphia & R. R. Co.* 11 Phila. 597; S. C. 32 Leg. Int. 363.

² *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea, 180; S. C. 42 Amer. Rep. 668. See, also, *Bland v. Southern Pac. R. Co.* 55 Cal. 570; S. C. 36 Amer. Rep. 50; *Hoffbauer v. Delhi & N. W. R. Co.* 52 Iowa, 342; S. C. 3 N. W. Rep. 121; S. C. 35 Amer. Rep. 278.

³ *Auerbach v. New York Cent. & H. R. R. Co.* 42 Amer. Rep. 290; 89 N. Y. 231.

⁴ *Sanger v. Dun*, 47 Wis. 615; S. C. 3 N. W. Rep. 388.

⁵ *Post v. Chicago & N. W. R. Co.* (Neb.)

1883, 15 N. W. Rep. 225; S. C. 9 Amer. & Eng. R. Cas. 345.

⁶ *Nevins v. Bay State Steam-boat Co.* 4 Bosw. 226; *Logan v. Hannibal & St. J. Ry. Co.* 12 Amer. & Eng. R. Cas. 142, (Mo. 1882); *Quimby v. Vanderbilt*, 17 N. Y. 315.

⁷ *Detroit & M. R. Co. v. Fire & Marine Bank*, 20 Wis. 127; *Morrison v. Phillips & C. Con. Co.* 44 Wis. 405; *Strohn v. Detroit & M. R. Co.* 21 Wis. 561; *Grace v. Adams*, 100 Mass. 508; *Kirkland v. Dinsmore*, 62 N. Y. 175.

⁸ *Madan v. Sherrard*, 10 Jones & S. 355;

authorities the distinction drawn by Judge DYER in the principal case between tickets and bills of lading, and the presumptions to be drawn from the receipt of each, is well sustained.

The injustice of considering tickets purchased in the usual manner to be contracts between the carrier and the passenger, is made clearly apparent from the remarks of the supreme court of Virginia.¹ "Usually the ticket office is opened but a short time before the train leaves, and the ticket has to be exhibited to the baggage master before he will check for the baggage, so that a passenger has scarcely any time to read the ticket before the train leaves. In general he only asks for a through ticket to the place of his destination, and relies upon the agent to give him the proper tickets, and if the passenger had time to look at it for an instant in this case, she would have seen that it was a ticket issued by the railway from Richmond to the White Sulphur Springs. She would hand it to the porter or a friend to get checks for her baggage, while she would look out for a seat. It is returned with the checks, upon which are the letters 'W. S. S.' She feels assured all is right, and the next moment the train is moving. If she reads what is on the ticket at all, it is because she has nothing else to do, or from mere curiosity, and she reads for the first time: 'Responsibility for safety of person or baggage, on each portion of the route, confined to the proprietors of that portion alone.' She would say to herself, that was not my understanding when I asked for a through ticket, and when I paid for it to the railroad agent, and when they gave me a check for my baggage, which by the letters on it indicated that they undertook to carry it through to the White Sulphur Springs. But the train has been bearing her away from Richmond with the speed of twenty miles an hour, and it is too late to turn back."

The discussion in *Henderson v. Stevenson*² is also to the point: "Plaintiff purchased at defendant's office in Dublin a ticket from Dublin to Whitehaven on one of defendant's steamers. This ticket had on the face these words only, 'Dublin to Whitehaven,' without referring to the back of the ticket, on which was the following indorsement: 'This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury, or delay to the passenger, or to his or her luggage, whether arising from the act, neglect, or default of the company, or their servants, or otherwise. It is also issued subject to all the conditions and arrangements published by the company.' Plaintiff did not read the indorsement, and his attention was not directed to it by any one. The steamer was wrecked on the passage, entirely through the negligence of the captain and crew, and all of plaintiff's luggage lost. He sued in Scotland for its value and obtained judgment, which was taken on appeal to the house of lords by the company, which held again the plaintiff was not bound by the condition in the ticket. Said the lord chancellor: 'It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two contracting parties, and without any knowledge of anything aside from the mere circumstance that upon the back of the document there is something else printed, which has not actually been brought to, and has not come to, the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented

Blossom v. Dodd, 43 N. Y. 269; *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647; 3 Amer. & Eng. R. Cas. 246; *Wilson v. Chesapeake & O. R. Co.* 21 Grat. 675; *Sunderland v. Westcott*, 2 Sweeney, 260; *Indianapolis & C. R. Co. v. Cox*, 29 Ind. 360;

Prentice v. Decker, 49 Barb. 21; *Limburger v. Westcott*, 49 Barb. 283; *Brown v. Eastern R. Co.* 11 Cush. 97.

¹ *Wilson v. Chesapeake & O. R. Co.* 21 Grat. 674.

² L. R. 2 Sc. & Div. 470.

to him. I am glad to find that there is no authority for such a proposition in any of the cases that have been cited." Lord CHELMSFORD said: "The lord chief justice, in the case of *Zunz v. Southeastern Ry. Co.* L. R. 4 Q. B. 544, which has been referred to, thought himself bound by the authorities to hold that when a man takes a ticket with conditions printed on it he must be presumed to know the contents of it and to be bound by them. I was extremely anxious to be referred to the authorities which influence the judgment of the lord chief justice, but, although numerous authorities were cited by Mr. Milward, none of them go to the length of establishing that a presumption of assent is sufficient. Assent is a question of evidence, and the assent must be given before the completion of the contract. The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage money, the ticket being only a voucher that the money has been paid; or, if a ticket is necessary to bind the company, the moment it is delivered the contract is completed, before the passenger has had an opportunity of reading the ticket, much less the indorsement." Lord HATHERLY said: "I agree with the observation that was made by my noble and learned friend, Lord CHELMSFORD, that the money having been paid, and the ticket having been taken up, a contract was completed, upon the ordinary terms of conveyance, for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary. A ticket is in reality in itself nothing more than a receipt for the money which has been paid."

The courts in the following instances refuse to infer assent to a contract limiting liability from the receipt of a ticket having such limitation printed upon it:

Where the ticket had printed upon it the following: "Passengers are not allowed to carry baggage beyond \$100 in value, and that personal, unless notice is given and an extra amount paid at the rate of a price of a ticket for every \$500 in value." On the journey one of the trunks was lost containing wearing apparel and articles of ordinary baggage to the value of \$690, and other property to the value of \$730. Held that, notwithstanding the memorandum printed on the ticket, the plaintiff is entitled to recover the value of his trunk, and of such portion of the contents as is customarily known and carried as travelers' baggage, although worth more than \$100, and though nothing extra was paid for baggage exceeding that sum in value.¹

A passenger bought a ticket to a place, but desired to "stop over" *en route* at an intermediate point. The ticket had printed upon it, "Good for this day only," but the ticket agent assured the passenger that the conductor would issue a "stop-over check." This the conductor, in obedience to orders from his superiors, refused to do, but left the ticket in possession of the passenger, who "stopped over," and, proceeding on his journey at a later day, presented it to the conductor, who refused to accept it and demanded fare. This was refused, and the passenger was ejected. Held, that the ticket was not the sole evidence of the contract to carry the passenger, but that evidence of the conversation with the ticket agent might be introduced, under which the passenger had a right to stop over, and might recover for his expulsion.²

Defendant's agent came into a railway car in which plaintiff was traveling, and called for baggage. He received the check for plaintiff's trunk, with directions as to its delivery, and marked on a blank receipt the date, number of check, place of delivery, which he handed to plaintiff without anything being said as to its contents. The car was dimly lighted, so that plaintiff, where he was seated, could not have read the receipt, and, without looking at it or

¹ *Nevins v. Bay State Steam-boat Co.* 4 Bosw. 226.

² *Burnham v. Grand Trunk R. Co.* 63 Me. 301.

reading it, he put it in his pocket. The receipt was marked upon the margin, "Domestic bill of lading," and purported to be a contract relieving defendant from or limiting its liability in certain specified cases, and, in particular, limiting its liability, save in case of a special contract, to \$100. The court refused to charge as a matter of law that the delivery of the receipt created a contract for the carriage of the trunk under the terms printed thereupon, and limited defendant's liability to the amount specified, but submitted the question to a jury.¹

The plaintiff's daughter, accompanied by another young girl, delivered a check for a trunk to a transfer company in New York, with directions to carry it to her home in Brooklyn. She was about to leave the office, when, at her companion's suggestion that she ought to have a receipt, she returned to the desk, and demanded one of the clerk, who handed her a receipt, in which it was stipulated that the company should not be liable to an amount exceeding \$100, unless a special contract was made. The trunk and contents were worth \$300, but nothing was said as to its value; neither did she read the receipt or see its contents until after the loss of the trunk. Held, that the notice was ineffectual.²

Another case decides that there is no presumption of law that a passenger on a railroad has read a notice limiting the liability of the railroad corporation for baggage, printed on the back of a passenger check, delivered with his ticket, and having on its face the words, "Look on the back," whereon notice of such limitation of liability was printed in small type. Nor is there any presumption of notice of similar limitations contained in placards posted in the cars. But the court expressly refrained from adjudicating "upon the broader question, whether a limitation of the liability of the railroad company as to the amount and value of the baggage of passengers transported on the road may not be effectually secured by the delivery of a ticket to the passenger, so printed in large and fair type, on the face of the ticket, that no one could read the part of the ticket indicating the place to which it purports to entitle him to be conveyed without also having brought to his notice the fact of limitation as to liability for his baggage."³

The agent of an expressman entered a railway coach, took up the checks of a passenger desiring his valise delivered, and gave such passenger a receipt for the check, having a special contract limiting the the expressman's liability printed on one side of such receipt. The special contract was printed in very small type on the side of the receipt, and the passenger could not read it in the dimly-lighted car. Held, that his acceptance of it did not make it a contract between himself and the expressman. The court expressly distinguished such a receipt from a bill of lading: "As to bills of lading, and other commercial instruments of like character, it has been held that persons receiving them are presumed to know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be carried. But checks for baggage are not of that character, nor is such a card as was delivered in this instance. It was, at least, equivocal in its character. In such a case a person is not presumed to know its contents or to assent to them."⁴

In another case it was sought to establish a contract limiting a liability by delivering a ticket containing a notice of limitation to a German unable to read English. "The plaintiff was a German," said the court, "wholly ignorant of the English language. It is therefore the case of a passenger uninformed of the terms and conditions of the notice appended to the ticket, on which the defendants rely for protection. * * * It in truth would be ab-

¹ Madan v. Sherard, 73 N. Y. 330.

² Woodruff v. Sherrard, 9 Hun, 322.

³ Malone v. Boston & W. R. Co. 12 Gray,

392. See, also, Verner v. Sweitzer, 32 Pa. St. 213.

⁴ Blossom v. Dodd, 43 N. Y. 269.

surd to hold, under the circumstances, the company exempted from their common-law responsibilities on the foot of a special or express contract, when he was ignorant of the terms of the proposed agreement. Granting that tickets in any case, without more, may be considered as evidence of a special agreement, it is surely not exacting too much to require the carrier to have his tickets printed and his advertisements made in a language which the passenger can understand, or that he should be required to explain to him the nature and effect of the proposed agreement." This case very well illustrates the disposition of railroad companies to shirk and evade all the responsibilities incident to their duties, while at the same time grasping every dollar and advantage they can claim as compensation for doing those duties. While in this case the company took the passenger's money, and assumed the care and carriage of his baggage, they tried to rid themselves of responsibility by stipulating on the ticket that "All baggage at the risk of the owner thereof; the proprietors binding themselves to no charge or care of the same whatever." This case is directly in support of Judge DYER's decision in the principal case.¹

In *Hopkins v. Westcott*,² A., a passenger on a railroad, delivered to an expressman a metallic check which he had received for his trunk, as baggage, so that the expressman might obtain the trunk and deliver it to the residence of A., who received from the expressman at the time a piece of paper on which the number of the check was indorsed, and which contained a printed notice that the expressman would "not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding one hundred dollars upon any article, unless specially agreed for in writing on this check-receipt, and the extra risk paid therefor. * * * And the owner hereby agrees that Westcott Express Company shall be liable only as above." It was held that A. was chargeable with actual notice of the contents of this paper, and bound thereby. But the court evidently was unwilling to allow this ruling to release the expressman from liability for the value of the baggage in excess of \$100, for it held that the words "any article" did not mean the trunk or piece of baggage and its entire contents in gross, but meant any article contained in the piece of baggage, and there being no single article worth more than \$100, judgment was rendered for the value of all the articles together, aggregating \$700. This case was discussed by Chief Justice CHURCH,³ who said: "I infer that the learned judge who delivered the opinion in [*Hopkins v. Westcott*] intended to decide that something short of an express contract will suffice to screen the carrier from his common-law liability, and that a notice personally served, which could be read, would have that effect. The attention of the court does not seem to have been directed to the distinction between such a notice and a contract. The delivery and acceptance of a paper containing the contract may be binding, though not read, provided the business is of such a nature, and the delivery is under such circumstances, as to raise the presumption that the person receiving it knows that it is a contract containing the terms and conditions upon which the property is received to be carried. In such a case it is presumed that the person assents to the terms, whatever they may be. This is the utmost extent to which the rule can be carried without abandoning the principle that a contract is indispensable."⁴

In the United States courts, the rule has always been very strongly laid down. Thus, in *The Pacific*,⁵ it was decided that in the federal courts, while the rule is that a common carrier may limit his liability, except for negligence,

¹Camden & A. R. Co. v. Baldauf, 16 Pa. St. 67; but see Fibel v. Livingston, 64 Barb. 179.

²6 Blatchf. 64.

³Blossom v. Dodd, 43 N. Y. 268.

⁴Id. 268, 269.

⁵Deady, 17.

by *express* agreement, nothing short of an express stipulation will constitute such an agreement, it must not depend upon implication or inference or conflicting evidence, and mere notice to the shipper is not sufficient. Where the drayman of the shipper, on the delivery of a package, takes a receipt from the freight clerk of the ship for the same, marked, "Not accountable for contents," this of itself does not constitute an agreement limiting the carrier's liability; it is a mere *ex parte* proposition on the part of the carrier after receiving the package, to which there must be direct and unequivocal evidence of the assent of the shipper to exonerate the carrier.

In *New Jersey Steam Nav. Co. v. Merchants' Bank*,¹ speaking of the right of the carrier to restrict his obligation by a special agreement, the supreme court of the United States said: "It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned; and this is not to be implied or inferred from a general notice to the public limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment."

Commenting upon this case, Mr. Justice DAVIS said: "These considerations against the relaxation of the common-law responsibility by public advertisements, apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce, to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public, or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence; but in the nature of the case this equality does not exist, and therefore every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights. It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed, such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of the common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight, when they have no right to impose them, would, in our opinion, work great harm to the business community."²

¹ 6 How. 344.

² *Railroad Co. v. Manuf'g Co.* 16 Wall 330.

As a result of the foregoing cases, the following conclusions may be stated: In making a contract with a passenger for his transportation, a railway company may limit its liability, but, as a general rule, not for its negligence. Mere notice that the railway company will not be liable in certain named contingencies will not suffice to create a contract of limitation; there must be a clear, unequivocal assent on the part of the passenger. Such assent may be express or implied, but it will not be implied (1) where the notice is obscurely printed, or printed in a language which the passenger cannot understand; (2) where the nature of the transaction is not such as necessarily to charge the passenger or shipper with knowledge that the paper contains a contract; *e. g.*, the acceptance of a bill of lading would be a transaction carrying notice of a contract printed upon it, but the acceptance of a ticket with conditions printed on it would not be such a transaction; nor (3) would a contract be created where the circumstances attending the delivery of the ticket repel the idea that the acceptor had knowledge of, or in fact assented to, the contract printed thereupon.

Tested by these considerations, the decision of the principal case upon this point appears to be unquestionably sound.

ADELBERT HAMILTON.

LAIRD v. CITY OF DE SOTO.¹

(Circuit Court, E. D. Missouri. May 8, 1885.)

1. MUNICIPAL CORPORATIONS—LIABILITY OF SUCCESSOR—INVALID REORGANIZATION.

An invalid reorganization of an incorporated town as a city cannot affect its corporate existence; and where the invalid reorganization is dissolved by a decree in *quo warranto* proceedings, and a valid city organization, composed of the same people and trustees, is created in the place of the town, the new organization becomes liable, as the successor of the town, upon its bonds.

2. SAME.

Where in such a case the city contains a trifle less land within its limits than the town, that fact does not affect its liability.

3. PRACTICE—MOTION FOR REHEARING.

Query, whether a motion for a rehearing of a motion for a new trial should be entertained.

Petition for a Rehearing of a Motion for a New Trial.

For opinion upon motion for a new trial, see 22 FED. REP. 421.

Mills & Flitcraft, for plaintiff.

Joseph A. Williams, for defendant.

MILLER, C. J. This motion for a rehearing of the motion for a new trial is a very unusual proceeding, and I have great doubt whether it ought to be entertained, even if the motion ought originally to have been granted; but looking over the case again, in the light of the pleas and agreed statement of facts, I am still of opinion that the defendant, the city of De Soto, is the lawful successor of the town of De Soto, which issued the bonds on which the judgment was rendered. The fact that the present city contains 400 acres less land in its lim-

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

its than the former town, does not change the liability of the people who constitute that town, nor does the change from a town to a city, nor does the decree attempting to abrogate the city organized in 1877, destroy the obligations of the town of 1872. When these people became organized into a city which is now in existence, that city, as the successor of the town of 1872, is liable for the debts of the former.

The motion for a rehearing is overruled.

HOLCOMB v. HOLCOMB.

(Circuit Court, E. D. Michigan. May 25, 1885.)

PRACTICE—RIGHT TO DISCONTINUE ACTION—REFERENCE—SET-OFF—STATUTE OF LIMITATIONS.

Where defendant pleaded a set-off, and the case was referred, and the referee had reported a balance due to the defendant, and the statute of limitations had run against an original suit upon his claim, *held*, that the plaintiff had no right to discontinue the action.

On motion of defendant to set aside an order of discontinuance, and for judgment against the plaintiff on report of referee. Plaintiff's declaration was upon the common counts. Defendant pleaded the general issue and notice of set-off. The case was referred to a referee, and the referee found and reported that the plaintiff was indebted to the defendant in the sum of \$26,531.49. Notice of the filing of this report was given plaintiff as required by law, and no objections were filed, but plaintiff entered an *ex parte* order discontinuing the case.

De Forest Paine, for the motion.

George S. Hosmer, for plaintiff.

BROWN, J. The right of a plaintiff, in an ordinary action at law, to discontinue his suit at any time before verdict, upon the payment of costs, is beyond question, and is expressly recognized in the practice of the circuit courts of this state. Circuit court rule 26. Whether this right exists in cases where the defendant has filed a set-off, and claims an affirmative judgment in his favor, as by statute he is entitled to do, is an open question, and the authorities are in hopeless conflict. The principal cases are collated in *Merchants' Bank v. Schulenberg*, 19 N. W. Rep. 741, in which the justices of the supreme court of this state were equally divided in opinion. Without expressing a decided opinion upon the general subject, it is sufficient for the purposes of this case to hold that where a cause is referred to a referee, and the referee has found a balance due to the defendant, and the statute of limitations has run against an original suit upon his claim, (as it is conceded to have done in this case,) the plaintiff ought not to be permitted to discontinue without the assent of the de-

fendant. Having provoked a conflict with defendant, and lulled him into the belief that he was willing to test his claim by way of set-off to his own demand, he should not be allowed, after a virtual defeat, to reap the fruits of a victory. The examination before the referee is a substantial trial of the action. Edw. Ref. c. 1, § 3. His report is equivalent to the verdict of a jury, (chapter 4, §§ 18-28,) and has the same effect by way of estoppel upon the parties. Chapter 27, § 10; Bigelow, Estop. c. 18. Now, the right to discontinue terminates with a verdict, and we think, by analogy, with the filing of the referee's report.

The motion is therefore granted.

HIGGINS and another v. McCREA.

(Circuit Court, N. D. Ohio, E. D. 1885.)

CHICAGO BOARD OF TRADE—RULE 26, § 6—CROSS-ACTION—CONTRACTS.

The cancellation by a broker of original contracts, without the substitution of others, as provided for by rule 26 of the Chicago board of trade, and without the previous knowledge or consent, or subsequent ratification, of the party for whom he is acting, will not be binding on such party, and he will be entitled to recover the "margin" advanced by him to the broker on the original contracts in a cross-action, in an action by the broker for the amount expended by him on such contracts.

At Law.

This case was tried to a jury at the April term, 1885, of above-named court, Hon. JOHN BAXTER, circuit judge, and Hon. MARTIN WELKER, district judge, presiding.

The plaintiffs claimed that they had expended, for and at defendant's request, \$31,644.31, for which they demanded a judgment. The evidence adduced in support of this claim showed that the plaintiffs were commission merchants and brokers, residing and doing business in the city of Chicago, and members of the Chicago board of trade; that the defendant authorized and requested them, in May, 1883, to buy large quantities of pork and lard for his account, to be delivered during the month of August, 1883. Pursuant to said order of defendant, the plaintiffs entered into several contracts in their firm name with other brokers, and members of said board of trade, for, and on defendant's account and risk, for August delivery, 3,000 barrels of pork and 2,000 tierces of lard, and duly notified him thereof. These contracts were made under the rules prescribed by the said board of trade. The evidence tended to show that the defendant was familiar with these rules, and tacitly consented to be bound by them.

The plaintiffs appeared as witnesses on the trial of the case and produced their books and exhibits, and it appeared, by their admis-

sions as such witnesses, that soon after the consummation of said contracts—to-wit, in the latter part of May and early in June following—the plaintiffs, in adjusting profits realized and losses sustained in other transactions in which they were personally liable, canceled said original contracts of purchase, made for defendant, and released the contracting parties from all further liability thereunder. They did this by what they termed “set-off” contracts. They claimed the right to do this under the sixth section of rule 26 of said Chicago board of trade, which rule is as follows:

“RULE XXVI.

“Sec. 6. In case any member of the association, acting as a commission merchant, shall have made purchases or sales by order and for account of another, whether the party for whom any such purchase or sale was made shall be a member of the board of trade or otherwise, and it shall subsequently appear that such trades may be offset and settled by other trades made by said commission merchant, he shall be deemed authorized to make such offset and settlement, and to substitute some other person or persons for the one from or to whom he may have purchased or sold the property originally: provided, that in case of such substitution the member or firm making the same shall be held to guaranty to his or their principal the ultimate fulfillment of all contracts made for account of such principal which have been so transferred, and shall be held liable to said principal for all damages or loss resulting from such substitution.”

On cross-examination the plaintiffs conceded that at the time of canceling said contracts they did not then, or at any time thereafter, *specifically* substitute any other party or parties in place of the original parties with whom they had contracted for defendant's account; nor did they notify the defendant of said cancellation and alleged substitution of other parties. And, on being asked who they considered bound to the defendant after such cancellations, for the deliveries contracted to be made, answered that they (the plaintiffs) only were so bound. They claimed, in explanation, that they had contracts for August delivery of pork and lard in quantities sufficient to enable them to make good the amounts agreed to be delivered to the defendant, and that they had in fact received from other parties the amount of pork and lard bought for defendant's account, and tendered the same to him pursuant to the terms of the original contracts, which he declined to receive and pay for. The plaintiffs further conceded that their books did not show what contracts took the place of those originally made for defendant, and which they afterwards canceled. The defendant had, at plaintiffs' repeated requests, advanced them on these contracts \$19,897 to indemnify them against loss. These advances were called “margins.” When the defendant declined on August 1st to accept and pay for the pork and lard tendered by plaintiffs, they sold the same in the usual way on defendant's account at a loss, in excess of the “margins” advanced, of \$31,644.31, the sum claimed in their petition.

The defendant pleaded that said contracts were gambling trans-

actions,—bets on the future prices of pork and lard,—that no actual delivery of those articles was contemplated; and that said transactions were contrary to public policy and illegal under the laws of Illinois; and again, for a second defense, that plaintiffs canceled said original contracts, without specifically substituting others, and, without his knowledge or consent, sold and disposed of the property for their own use and benefit; and that at no time after June 16, 1883, did the plaintiffs hold any contracts whatever for defendant's account. Defendant filed a counter-claim, and asked a judgment for the sums advanced by him as margins, viz., \$19,897, with interest, etc.

C. C. Bonney and F. J. Wing, for plaintiffs.

S. Burke and W. B. Sanders, for defendant.

The court, through Judge BAXTER, after disposing of the defense that said transactions were of a gambling character, in directions as to the law, to which no exceptions were taken by either party, proceeded to further instruct the jury as to the other defense, substantially as follows, to-wit:

"If you shall, under the instructions heretofore given, find that the contracts in question were made for legitimate purposes, and were therefore valid, you may, for the purposes of this case, assume that the the sixth section of the twenty-sixth rule of the Chicago board of trade, read in evidence in this case, authorized the plaintiffs to cancel the contracts first made for defendant's account, and substitute other and like contracts with other parties in lieu thereof, and that the defendant understood its force and effect, and consented to be governed thereby in his transactions with plaintiffs; and still the plaintiffs will not be entitled to recover in this action, because they did not, in fact, substitute other contracts with other parties, as required by the said rule, in such manner as that the defendant could enforce them, or proceed against the vendors therein for damages in a case of a failure to comply therewith.

"The cancellation of the original contracts in the manner conceded in the testimony, that is to say, without the specific substitution of other contracts, and without the previous knowledge or consent of the defendant, or his subsequent ratification, absolves him from all liability thereunder, and entitles him to recover back from the plaintiffs the amounts advanced as 'margins,' with interest thereon from the respective payments."

Under these instructions, the jury found in favor of the defendant upon the causes of action set forth in plaintiffs' petition, and against the plaintiffs upon the counter-claim set up in the answer, in the sum of \$22,062.42.

A motion for a new trial has been filed, but has not yet been disposed of.

McKINNEY v. ROSEN BAND and another.

(Circuit Court, S. D. New York. May 19, 1885.)

FRAUD ON CREDITORS—DIVERSION OF PARTNERSHIP FUNDS.

Mercantile partners, though knowing that they are in some difficulty, so long as they have a reasonable expectation of extricating themselves, cannot be charged with a fraudulent diversion of their property from firm creditors, for simply drawing money upon private account, within small and reasonable limits, whether for the payment of their individual expenses, or the payment of their honest individual obligations.

Motion to Vacate Attachment.

S. F. Kneeland, for plaintiff.

Angel & Ward, for defendants.

BROWN, J. The defendants, being in business as copartners under the name of J. & B. Rosenband, on the third of January, 1885, made a general assignment for the benefit of their creditors. In this action, brought upon partnership claims, the plaintiff, on the twelfth of February, 1885, obtained an attachment in the state court against the property of both defendants, on the ground that they had "assigned, secreted, and disposed of property with intent to defraud their creditors." The suit having been removed into this court, a motion is now made to dissolve the attachment.

The only act proved, alleged to be fraudulent as to creditors, is the appropriation by Jacob Rosenband, one of the defendants, of the sum of \$748.50 from the funds of the firm during the month of December, 1884, to pay an individual debt of \$355, owed by him to one Blumberg; \$300 to pay a just debt of his to his sister Jennie; and \$93.50, a part of her wedding expenses. The entire drafts of the defendant Jacob Rosenband from the firm during the year, including the three items last mentioned, amount to \$2,252.94. The other defendant during the year drew on individual account \$2,321.03, and these drafts were not unreasonable, considering their business.

It is urged that the use of firm moneys for the payment of individual obligations is a violation of the rights of copartnership creditors in the distribution of the joint and separate estates,—a right which exists upon the equitable marshaling of assets; and that such an appropriation of the firm moneys is, therefore, legally fraudulent as to them. I have much doubt whether section 636 of the New York Code, by the words "with intent to defraud his creditors," is designed to include any such injury to the mere equitable rights of the firm creditors prior to a condition of known and acknowledged insolvency, or prior to some act, such as an assignment of their property, which in itself calls for an equitable marshaling of assets as between the joint and individual creditors. Until actual insolvency arises, no such right practically exists. In the present case, it is not so clearly established that the insolvency of the firm, and its inability to continue

its business, were so far known in December, at the time when the small payments in question were made, as to justify the application of the principle contended for to this case. The mere fact, subsequently proved, that they were at the time insolvent, is not sufficient. Merchants, though knowing that they are in some difficulty, so long as they have a reasonable expectation of extricating themselves, cannot be charged with a fraudulent diversion of their property from firm creditors, for simply drawing moneys upon private account, within small and reasonable limits, whether for the payment of their individual expenses, or the payment of their honest individual obligations.

The attachment in this case should be dissolved.

JEFFRIES v. LAURIE.¹

(Circuit Court, E. D. Missouri. May 1, 1885.)

1. ATTORNEY AND CLIENT—RETENTION OF MONEY COLLECTED—PRACTICE.

Where an attorney collects money for his client in a suit instituted here, and keeps it, the court will make an order requiring him to pay it over, and, if he fails to obey, will take measures to prevent his further practicing before it.

2. SAME—DISPUTE AS TO FEES.

Where, in such a case, the attorney claims that his client is indebted to him for his services and expenses in a certain sum less than the amount collected, and the client denies that the amount claimed is due, the court will order the surplus over what the attorney claims to be paid over.

3. SAME—PARTNERSHIP—PARTIES.

Where an attorney brought suit for a client while in partnership with another attorney, and, after the firm was dissolved, collected a large sum and retained the whole, and more than five years after said dissolution said client applied for an order to compel his attorney to pay over the amount collected, *held*, that the fact that there is an unsettled account between the said partners, involving a comparatively small sum, is not a sufficient ground for refusing the order against the attorney who made the collection alone.

Motion for an Order to Compel Joseph S. Laurie to pay over money collected for C. S. Jeffries, administrator.

On March 25, 1885, this matter was called up, and Judge BREWER said:

"Evidently there has been some misunderstanding between the counsel and the court as to the *status* of this case, and I have been waiting for some days in the hope that counsel on both sides would be present, so that I could put the thing in proper shape for disposition. I see they are here this morning, in response to the notice that I required to be given yesterday.

"The facts in this case, as they are disclosed by the papers here, are these:

"Jeffries, administrator of Kennedy, deceased, brought an action against an insurance company, and recovered judgment here. The case was taken to the supreme court. While the case was pending there, the attorney or

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

attorneys for Jeffries compromised that judgment and received payment. Jeffries, by his attorney, Mr. Crews, filed a motion, setting up the original judgment and payment, and saying that Joseph S. Laurie, counsel for Mr. Jeffries, the administrator, received between nine and ten thousand dollars in that settlement; that Mr. Laurie is an officer of this court, an attorney admitted to practice here; that he has failed to pay over the money thus collected to his client, and asks the order of this court that he be directed to pay it over. That petition was filed by Mr. Jeffries, through Messrs. Crews & Bragg, as attorneys, some time last spring.

"To the petition setting forth these facts, Mr. Laurie filed an answer setting forth as one matter that there had been no adjustment of his fees; that the fee was contingent, etc. I think that cuts no figure in the case, even if his compensation as counsel was contingent and unsettled. An attorney may not withhold the entire proceeds of the collection to enforce an adjustment as to the amount of fees which he claims; he is bound to pay over that about which there is no dispute, and then afterwards settle that as to which there is a dispute. But beyond that, he says that it would be unjust to proceed in this summary way to compel the payment of the money thus collected, because, as stated, Mr. Crews, the attorney of Mr. Jeffries in this present motion, a son-in-law of Mr. Jeffries, (though I do not think that makes any difference,) was a partner of Mr. Laurie when this suit of Jeffries, administrator, against the insurance company was commenced; that they were partners in business as attorneys; that there were difficulties which arose between them; that there is an unsettled account between them; that Mr. Crews collected a fee of \$20,000 belonging to the partnership of Crews & Laurie, which he pocketed and refused to account for; and that this proceeding on the part of Mr. Jeffries, administrator, is in bad faith, in that it is against Mr. Laurie, one of the firm, and not against Crews & Laurie, the partners; and that the object is by a summary order to compel one member of this firm to pay over moneys which had been collected by the firm, leaving that member of the firm to his action for an accounting with his partner, who has, according to the statement, collected \$20,000—double the amount of this judgment—and pocketed it. That, briefly, is an outline of the answer set forth by Mr. Laurie.

"Last fall, when I was here, the papers were handed to me, (there was no testimony accompanying them,—just simply the petition and answer,) on the claim made by Mr. Crews for the petitioner, that, notwithstanding these facts set up in this answer of Laurie, they were entitled, as of right, to this order. Well, I looked it over, and it seemed to me that they were not entitled to such an order, if the facts were as stated in the answer, and I returned the papers, saying that there must be testimony presented to me as to the facts in the case. No testimony has yet been taken; no traverse, in any shape or form, has been filed to this answer of Mr. Laurie. So it stands to-day, upon the statement of Jeffries, administrator, that one of the firm of Crews & Laurie has this amount of money which he has failed to pay over, and the counter-statement of Mr. Laurie not denying the receipt of that nine or ten thousand dollars, but saying that it is a proceeding in bad faith introduced by his former partner to use the summary processes of this court to compel him to pay over money collected by the firm, and avoid an adjustment of the partnership account between himself and his former partner.

"Well, we might as well look at these questions squarely; there is no use of trying to avoid them. If an attorney collects money and fails to pay it over, he is an officer of this court, and it is the duty of this court to make an order requiring him to pay over that money, and, if he fail to pay it over, then take such measures as will prevent his further practicing in this court. It is the simple question whether an officer of this court discharges his duty by his client. And if this proceeding had come from an entire stranger to this transaction, I should have suggested to him to make both members of

the firm parties defendant,—let them both appear,—and if the fault rested with one, why that one alone would be summarily punished. But while that is true, and it is equally true that, independent of any relations between the partners, any client may maintain his action against either one of the partners for money collected by the firm, whether he was the individual that received the money or not; yet when it comes to these summary proceedings, in which the court does not simply determine the legal rights, but endeavors to preserve the character of the bar, and to see that no wrong is done by one of them to a third party, or by one of them to a brother lawyer, then the question comes in a little different shape.

“Of course, I know nothing about this case except what appears upon these statements; and if it be true that Mr. Crews has collected \$20,000 belonging to the firm of Crews & Laurie, and that Mr. Laurie has collected \$10,000 of a judgment which, less the fees, goes to the petitioner, then I shall say that such petitioner must proceed against the firm of Crews & Laurie, and that neither one of them will be released from the obligation to pay by reason of any differences between themselves, or absolved from the reach of the order of this court directing payment, or any subsequent remedies which are proper in the case; that is, I do not propose in this summary way to use the process of the court to perfect or prevent an adjustment of partnership affairs between the partners. If it is a mere excuse, a mere sham, a mere pretense, which Mr. Laurie has put forth to avoid payment, that fact must be developed, and when developed it will be disregarded without hesitation. If it is an honest claim,—if it is true that Mr. Crews, the son-in-law of the petitioner, has in his pocket twenty thousand dollars of fees belonging to the firm of Crews & Laurie,—then I would not allow Mr. Crews' father-in-law or any friend of his to take a summary order against Laurie alone; I would let him have an order against Crews & Laurie, and enforce it against both. That is the way it impressed me before and still impresses me. So I state to them that there seems to be a misunderstanding in regard to it, and that I shall want testimony to show what the facts are. Of course, there is no dispute as to what the facts are of record; but there has been no formal traverse filed to this reply of the respondent, Mr. Laurie. Counsel are both here, and I wish to put the matter in such a shape that there shall be a formal traverse making up the issues, so that each party can make his showing of the case. So far as this defense is concerned, it is a matter which Mr. Laurie must establish if it is traversed. As I said, there has been no traverse, and so the order will be that the petitioner can traverse within three days, for it requires but a little time to traverse this return or answer of Mr. Laurie; and that within 10 days thereafter Mr. Laurie may, by affidavit or deposition, present his testimony as to the facts in that answer or return of his; and petitioner can have ten days thereafter, in a similar way, to file affidavit or take testimony by deposition as to his understanding of the facts; and then I will have the matter before me as to whether this return is a mere excuse to avoid an obligation a lawyer owed to his client, or whether it is an honest presentation of a dispute as between partners. Until I know those facts, I do not feel like making any peremptory order in the matter. As there seems to have been some misunderstanding, counsel were notified to be here this morning, that they might have the matter stated when they were both present.”

The answer having been traversed and affidavits filed, the following opinion was delivered.

T. B. W. Crews, for plaintiff.

Joseph S. Laurie, pro se.

BREWER, J., (*orally*.) In this case of *Jeffries v. Laurie* counsel are not present, but as I shall leave the city to-night or in the morn-

ing I must dispose of it. It is one of those cases that it is not very pleasant for the court to consider or decide. It is an application by Mr. Jeffries, as administrator *de bonis non* of the estate of Allen A. Kennedy, for an order on Joseph S. Laurie, who was his attorney in a case brought against the Mutual Life Insurance Company of New York, to pay over moneys collected by him, and belonging to the administrator. There has been a long and bitter controversy, which it is not necessary to enter upon, but it appears that in 1879 Mr. Laurie, as the attorney of the administrator, settled the case which was then pending against the insurance company, and received in cash \$9,401. None of that money has ever been paid to the administrator. Mr. Laurie claims that there was an agreement for a contingent fee for one-half the amount collected, and that he went to the expense of two trips to New York city, amounting to \$130, leaving, according to his own statement, \$4,635.50 belonging to the administrator, and which, on or before the tenth of March, 1880, he stated that he had in his hands for the administrator, and which he was ready to pay over upon the signing of a receipt by him prepared, and recognizing the correctness of the contingent fee. The counsel for Mr. Jeffries in this application is Mr. Crews. At the inception of the litigation against the insurance company Mr. Crews and Mr. Laurie were partners. That partnership was dissolved in 1873 or 1874. There has never been a settlement between those gentlemen of their partnership affairs, and Mr. Laurie resists this application, on the ground, as alleged in his answer, that his partner had collected from Franklin county large fees, amounting to \$15,000 or \$20,000, and failed to account with him, and that this proceeding by the administrator, the father-in-law of Mr. Crews, was at the instigation of Mr. Crews, and simply an attempt in this summary way to prevent a settlement of the partnership affairs between the two partners; Mr. Crews being, as claimed, financially irresponsible.

This matter has been here some time, and in the fore part of this term I directed both parties to file affidavits within a certain time, and make such showing as they saw fit to do with reference to the actual affairs,—the underlying facts; and the testimony has been presented. I do not think, from that testimony, that Mr. Laurie has any interest in the Franklin county fees; and, while there is an unsettled partnership account between them, the amount involved therein is nothing like the \$9,000 received and retained by Mr. Laurie. Of course, in this summary way no partnership affairs can be settled; and, while it would have relieved this case of all embarrassment if the administrator had filed this application against both Messrs. Crews and Laurie, yet I do not think that there is developed enough in the testimony to justify Mr. Laurie in retaining this \$4,635, which unquestionably belongs to the administrator. If there was, and there is, an unsettled partnership account between Messrs. Crews and Laurie, the matters involved therein were closed more

than five years ago, and they ought not now to relieve from the duty resting upon a lawyer, holding money which unquestionably belongs to his client, to pay that money over. If he had any claim to retain that, or any portion of that amount, as between himself and his partner in legal business, it was his duty to have proceeded to an accounting, and have had the matters between himself and his partner adjusted long before this. Whatever might have been the results of such an accounting, from the testimony here it seems very clear to my mind that there would not have been found due Mr. Laurie, if anything, certainly nothing like the \$9,000 by him received.

The relations between a lawyer and his client are not those merely of debtor and creditor. The lawyer collects money of his client, so to speak, in trust for him, and it is the duty of the court, in upholding the character of the profession, to see that moneys so collected are paid to the client. It would be very hard, indeed it would work lasting disgrace to the profession, if, when a lawyer collects money belonging to his client, the only remedy which the client has is a suit at law against the lawyer. There is here a dispute as to whether counsel were entitled to the contingent fee of half the collection. Be it so. Such dispute the court is not called upon to settle in any summary proceeding. But there is no dispute but that \$4,635—one-half—does belong to the estate,—to the administrator; and there is no question but that the person who received that money—the whole \$9,000—is Mr. Laurie. I do not think that it lies in his mouth to say, having received that money—the whole of it,—“I won’t pay over the half which I admit belongs to the administrator, simply because I have got an unsettled partnership transaction with my former partner in the practice.” He has had time enough to settle that. He admits the amount of \$4,625 is due the administrator; and while Mr. Crews may be the son-in-law of the administrator, (and, as is very patent, there is a great deal of bitterness of feeling and a good many things that do not reflect much credit on either party,) yet the administrator stands here without the money; Mr. Laurie having received it, admitting that some of it is unquestionably due, and disputing only as to whether such amount should not be paid by his former partner.

As I said in reference to this case at the first of this term, courts will not attempt to settle partnership affairs between members of the bar by any summary proceedings of this nature; but it is also true that they will not permit a failure of such partners to make a settlement, especially when that failure is prolonged for many years, to become an excuse to either partner for holding moneys concededly belonging to the client.

I think justice requires that an order should be made—a summary order—for the payment of this undisputed amount into court for the benefit of the administrator; and the order will be that Mr. Laurie, within 90 days, pay to the clerk of this court the sum of \$4,635.50.

*In re ZIEBOLD.*¹

(Circuit Court, D. Kansas. May 14, 1885.)

CONSTITUTIONAL LAW — "DUE PROCESS OF LAW" — KANSAS ACT OF MARCH 7, 1885—HABEAS CORPUS.

A person imprisoned for refusing to appear or testify before a county attorney in a proceeding under the eighth section of the act of the legislature of Kansas, approved March 7, 1885, being an act amendatory of the act prohibiting the manufacture and sale of intoxicating liquor, is restrained of his liberty without "due process of law," within the meaning of the fourteenth amendment to the constitution of the United States, and entitled to be released on *habeas corpus* issued by the United States circuit court.

The petitioner was committed to jail for refusing to testify before the county attorney, and sued out a writ of *habeas corpus*. Further facts appear in the opinion.

B. P. Waggener and Thomas P. Fenlon, for petitioner.

W. D. Gilbert, Co. Atty., for the State.

FOSTER, J. The petitioner in this case alleges that he is imprisoned and deprived of his liberty, in violation of the provisions of the fourteenth amendment to the constitution of the United States. That amendment provides, among other things, that no state shall deprive any person of life, liberty, or property without "due process of law."

The federal courts and judges are authorized, among other causes, to issue the writ of *habeas corpus* for a person in custody and imprisoned in violation of the constitution, or of a law or treaty of the United States. Rev. St. § 753. The jurisdiction of this court to issue the writ and hear the case depends upon the truth of the averments in the petition, and therefore the jurisdiction of this court and the main question are so inseparably connected together that the determination of one must determine the other. It appears from the petition and the return to the writ that the petitioner is held in custody and imprisoned by the sheriff of Atchison county by virtue of a commitment issued to him by the county attorney, committing the petitioner to the county jail for refusing to obey a subpoena issued by said attorney, and refusing to be sworn and give testimony before him in proceedings under the eighth section of the act of the legislature of Kansas, approved March 7, 1885, being an act amendatory to the act prohibiting the manufacture and sale of intoxicating liquors, etc. It is admitted that the county attorney acted and proceeded in accordance with the provisions of the law; and the question is fairly presented whether a person imprisoned for refusing to appear or testify before the county attorney in such proceedings is restrained of his liberty without "due process of law," within the meaning of the constitution of the United States.

The first matter of inquiry is the meaning of the term "due process of law." If it has no broader meaning than process prescribed by act of the legislature, it is the end of the case. But such a construc-

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

tion would render the constitutional guaranty mere nonsense, for it would then mean no state shall deprive a person of life, liberty, or property, unless the state shall chose to do so. It has repeatedly and uniformly been adjudicated that the terms "due process of law" and "law of the land" have a broad and comprehensive meaning, and originated in that great bill of rights, *Magna Charta*, and operate as a restriction on each branch of civil government. *Murray's Lessee v. Hoboken Land Co.* 18 How. 272; *Davidson v. New Orleans*, 96 U. S. 107; *Ex parte Virginia*, 100 U. S. 346. In the last-cited case the court, speaking of these words in the constitution, says:

"They have reference to the actions of a political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provisions, therefore, must mean that no agency of a state, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of a public position under a state government deprives another of property, life, or liberty, without due process of law, violates * * * the constitutional inhibition, and, as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional provision has no meaning."

These words in the constitution have been defined in various terms by different courts, but all the definitions tend to the same general idea. Mr. Justice EDWARDS has said in one case:

"Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." *Westervelt v. Gregg*, 12 N. Y. 209.

Mr. Justice JOHNSON, of the supreme court of the United States, says:

"As to the words from *Magna Charta*, incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: That they were intended to secure the individual from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235.

This definition has been several times approved by that court. *U. S. v. Cruikshank*, 92 U. S. 554; *Hurtado v. California*, 110 U. S. 527; *S. C. 4 Sup. Ct. Rep.* 111.

Judge COOLEY says:

"Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." *Cooley*, *Const. Lim.* 356; *Wynehamer v. People*, 13 N. Y. 432; *Taylor v. Porter*, 4 Hill, 145.

With this general principle established, and the meaning of those words defined, the difficulty remains of applying the principle to any particular case. In the case of *Hurtado v. California*, *supra*, Mr. Justice MATTHEWS, in a very learned and exhaustive opinion, speak-

ing for the court, (Mr. Justice HARLAN dissenting,) held that the words "due process of law," in this amendment, do not necessarily require an indictment by a grand jury in a prosecution by a state for murder; and in *Munn v. Illinois*, 94 U. S. 115, the chief justice says:

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of the municipal law, and is no more sacred than any other. * * The law itself, as a rule of conduct, may be changed at the will or even the mere whim of the legislature, unless prevented by constitutional limitations."

And in *Walker v. Sauvinet*, 92 U. S. 90, the court held that this amendment did not guaranty the right of trial by jury in all cases in the state courts. These cases tend to establish the doctrine that the rules and forms known to the common law, in judicial proceedings not affecting the ultimate rights of the party, are not necessarily guaranteed to a person under the constitution, and it has long been established that the remedial process of the law may be altered at the will of the legislature, so it does not impair a vested right, or cut off the remedy altogether. The words "due process of law," then, must be directed at something deeper than the mere rules and forms by which courts administer the law. They evidently were intended to guaranty and protect some real and substantial right to life, liberty, and property as the ultimate result, and probably to prohibit any arbitrary and oppressive proceedings by which the individual is deprived of either. There are certain things that are manifestly obnoxious to this provision. For instance, the property of one person cannot be taken from him for private use and given to another, even though he is compensated for it, and is given every opportunity to be heard through all the forms and solemnity of judicial proceedings. *Taylor v. Porter*, 4 Hill, 149; *Cooley*, Const. Lim. 357. Nor can a person be condemned without an opportunity to be heard and make his defense, although he may be guilty. When we go beyond a few well-defined landmarks in this direction, we are upon a broad sea of uncertainty. In any case, we have to inquire if the person is imprisoned in violation of a due course of legal proceedings, according to those settled maxims, rules, and forms established for the protection of private rights against the arbitrary exercise of power, unrestricted by established principles applicable to such rights, and to the administration of justice.

By section 1, art. 3, of the constitution of Kansas, the judicial power of the state shall be vested in certain courts therein named, and such other courts, inferior to the supreme court, as may be provided by law. Undoubtedly the legislature has the constitutional right to establish inferior courts, and define and limit their jurisdiction, powers, and proceedings. Judicial powers may be conferred without expressly naming the tribunal a court, and these powers may be confined to one or more subjects of adjudication. They may be very limited or very extensive in their scope, and I am not prepared

to say that a ministerial officer may not be selected to perform these judicial functions. The coroner of a county has both ministerial and judicial duties to perform. County commissioners have to some extent both duties imposed on them, and probably the same is true of a sheriff of a county. That the duties imposed on the county attorney under the eighth section of the act in controversy are judicial powers must be admitted. He is to hear and determine, compel the attendance of witnesses by subpoena and attachment, and to punish them for disobedience to his writs. The power of courts acting within their jurisdiction to punish witnesses for contempt is a necessary and admitted power. It goes with the judicial attribute, and without it a court is powerless to enforce its orders or protect its dignity. The serious objection urged to the law under consideration is that the county attorney is the public prosecutor for the state. He is the informer against offenders, and on his information parties charged with crime are put upon trial. The judicial powers conferred on him by this law are not to hear and determine matters in which he stands indifferent between the parties, but are given to aid and assist him in the performance of his ministerial duties, and have no other purpose, making the judicial powers auxiliary and subordinate to the ministerial duties, and are given to him as a means by which he can more successfully procure evidence to institute and carry on prosecutions; and in this respect the powers given him are very great, and in the hands of an unscrupulous man, stimulated by animosity or avarice, could be used as an instrument of sore oppression.

On the mere unsworn statement of any person, and without any case pending before him, it is made his duty, under severe penalties, to set this judicial machinery in motion, with no restriction as to whom he shall summon before him to testify, and no limitation but his own good will as to the scope of his investigation; fortified by a power to exact answers to any questions he sees proper to ask, almost despotic in its severity. The witness must answer the questions, or go to jail for contempt. It may be answered that such is the case in all trials, but there is this wide difference: In trials in open court on issues made up between the parties, the relevancy and competency of the question is submitted to the court, and argument of counsel is heard; the rights of the witness, as well as the party, are discussed, considered, and decided. And what makes the power given by this law still more dangerous and objectionable, is that the law makes it to the interest of the judge (county attorney) to find evidence of an offense committed. He is offered a reward to excite his vigilance and cupidity, and threatened with severe punishment if he fails or neglects to faithfully perform these duties. In some respects these duties are similar to those of a grand jury and court combined. The proceedings are preliminary, to ascertain if there is probable cause to charge the party with the offense. But a grand juror may be challenged on the ground that he is prosecutor or complainant or

a witness upon a charge coming before him for investigation. St. 1879, p. 842, § 79. Nor can a grand jury issue a subpoena for a witness, or decide the competency of a question asked, or punish for contempt. These matters rest with the court. Sections 85-88. This provision of the act of March 7, 1885, is a strange combination of judicial and ministerial duties, aided with rewards and penalties, and, so far as I have been able to ascertain, is an anomaly to all the judicial proceedings known to the land. It attempts to unite the judicial with the executive branch of civil government; and when the law-making power and the power which declares and applies, as well as that which executes and administers the law, are united and vested in one person or body, it becomes a despotic and not a constitutional government.

Are these objections sufficient to justify a court in the conclusion that a person restricted of his liberty under these proceedings is deprived of his liberty without "due process of law?" I am compelled to answer in the affirmative. I believe no precedent can be found for the application and use of judicial power in the manner and for the purpose contemplated by this act, and that it is a dangerous innovation on the fixed maxims and rules in the administration of justice, established for the protection of private rights. In this conclusion I am also sustained by a recent decision of Judge CROZIER, of the First judicial district of this state. *In re Beller*, 1 Kan. Law J. 229.

It is therefore ordered that the petitioner be discharged from custody.

STATE OF TENNESSEE v. HIBDOM.

(Circuit Court, M. D. Tennessee. April Term, 1885.)

COURT-MARTIAL—TRIAL OF SOLDIER FOR MURDER—JURISDICTION OF STATE COURT—ACT OF MARCH 3, 1863.

A state court in Tennessee has no jurisdiction to try a party for a murder alleged to have been committed on February 22, 1865, while the accused was a soldier in the United States army, as such offense is triable under the act of congress of March 3, 1863, by court-martial.

Habeas Corpus.

Andrew McClain, U. S. Dist. Atty., and W. B. Stokes, for petitioner.

J. A. Jones, for the State.

KEY, J. The petitioner, who is the defendant in this case, is under indictment, in the circuit court of Cannon county, Tennessee, for the murder of James Gibson. He has been arrested and imprisoned in the jail of Cannon county under the charge. He insists that he is not subject to the jurisdiction of the state court, because, at the time

the murder is alleged to have been committed, he was a soldier in the federal service, and that a court-martial had the sole and exclusive jurisdiction of his case.

The thirteenth section of the act of congress of March 3, 1863, to enroll and call out the national forces, enacts "that in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States and subject to the articles of war; and the punishment for such offenses shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed." 12 St. 736.

In the case of *Coleman v. Tennessee*, 97 U. S. 510-520, Justice FIELD, delivering the opinion of the court, says this section "does not make the jurisdiction of military tribunals exclusive of the state courts. It does not declare that soldiers committing the offenses named shall not be amenable to punishment by the state courts. It simply declares that the offenses shall be 'punishable,' not that they shall be punished by the military courts; and this is merely saying that they may be thus punished." 97 U. S. 513, 514. But, notwithstanding the principle thus enunciated, the court goes on to say:

"In denying to the military tribunals exclusive jurisdiction, under the section in question, over the offenses mentioned, when committed by persons in the military service of the United States, and subject to the articles of war, we have reference to them when they were held in states occupying, as members of the Union, their normal and constitutional relations to the federal government, in which the supremacy of that government was recognized, and the civil courts were open and in the undisturbed exercise of their jurisdiction. When the armies of the United States were in the territory of insurgent states banded together in hostility to the national government, and making war against it,—in other words, when the armies of the United States were in the enemy's country,—the military tribunals mentioned, had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offenses of every grade, committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject, during the war, to the laws of the enemy, or amenable to his tribunals for offenses committed by them. They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished." 97 U. S. 515.

But it is insisted on behalf of the state that the state of Tennessee had been restored to its normal condition in the Union at the time the offense is charged to have been committed; that a military governor had been appointed by the president of the United States, and the machinery of the state government was friendly to and acknowledged the federal government and constitution as paramount to its authority. The case of *Coleman v. Tennessee* decides this point also. The murder in *Coleman's Case* was alleged to have been committed

March 7, 1865. 97 U. S. 510. The murder with which the petitioner is charged, is alleged to have been committed on the twenty-second day of February, 1865. The supreme court of the United States say, in the *Coleman Case*:

"The fact that when the offense was committed for which the defendant was indicted, the state of Tennessee was in the military occupation of the United States, with a military governor at its head appointed by the President, cannot alter this conclusion. (That is that the state courts had no jurisdiction.) Tennessee was one of the insurgent states forming the organization known as the confederate states, against which the war was waged. Her territory was enemy's country, and its character in this respect was not changed until long afterwards."

I think the *Coleman Case* is decisive of all the points made in the one under consideration, and have come to the conclusion that the motion made on behalf of the state of Tennessee to quash or dismiss the writ of *habeas corpus*, because the facts stated in the petition are not sufficient to authorize its issuance, must be overruled.

NOTE.—Upon the hearing of the petition upon its merits, it appeared that the petitioner was a federal soldier at the date of the alleged murder. The judge thereupon ordered that he be released from his imprisonment, and the order was carried into execution.

WOONSOCKET RUBBER CO. v. CANDEE and others.

(Circuit Court, D. Connecticut. May 19, 1885.)

PATENTS FOR INVENTIONS—TAP FOR RUBBER BOOTS—NOVELTY.

Patent No. 103,594, granted May 31, 1870, to Francis Flynn, for an improved tap for rubber boots, held void for want of patentable novelty.

In Equity.

B. F. Thurston, Causten Browne, and Chas. E. Mitchell, for complainant.

J. S. Beach and C. R. Ingersoll, for defendant.

WALLACE, J. The complainant's bill in this suit alleges infringement of the patent granted May 31, 1870, to Francis Flynn, assignor of complainant, for an improved tap for rubber boots. The answer sets up that the alleged invention was known to and used by others in this country prior to the invention of Flynn, and that there was no invention in the improvement in view of the prior state of the art.

The patentee states in his specification that the improvement "consists in the construction of the double sole or tap," which on the rubber boots and shoes theretofore made "terminated abruptly where the shank begins, which is objectionable, because in walking the greatest strain comes directly across this point, so that after a few months'

wear the tap becomes started from the sole, making the boot useless." He proceeds:

"It is my object to remove this objectionable feature, which I accomplish by extending the tap, B, under the shank of the boot, A, and instead of narrowing the tap abruptly at the points, *b, b*, rounding gradually, narrowing it down to the point, *b'*, as clearly shown in figure 2 of the drawing. The tap and main sole of the boot and shoe are united while in a plastic state, and then vulcanized together. By constructing the tap in this manner the strain brought upon it at the points, *b*, will be partly taken up by the extension and relieved to such an extent that it will be impossible to start off the tap; besides, it will make the boot just as serviceable as one with an entire double sole, though it can be made at less cost."

The claim is:

"A rubber tap sole for rubber boots, formed with a long and pointed shank, extending under the shank of the boot or shoe, said tap sole being fastened to the main sole by vulcanization, substantially as and for the purpose described."

If the invention thus claimed is an extra rubber sole of the form and fastened to the main sole as described, without regard to the thickness of the extra sole, want of novelty is established by the proofs. Soles of this form, and fastened to the main sole in the manner described in the specification, were made by the Hayward Rubber Company at Colchester, Connecticut, in 1865, and by the New Brunswick Rubber Company at New Brunswick, New Jersey, in 1866.

The fact is not disputed that shoes like the Exhibit Hayward German Shoe were made by the Hayward Rubber Company, in 1865, and the proofs show satisfactorily that shoes like the exhibits "New Brunswick, 1866," and "New Brunswick, 1860 to 1870," were made by the New Brunswick Rubber Company in 1866 and subsequently. The extra sole on the shoes of the first two of these exhibits is of the specific form of the tap sole of the patent, and that in the shoes of the last exhibit, although rounded under the shank instead of being brought to a sharp point as in the patent, is sufficiently pointed to perform the functions of the patented tap, and, for all practical purposes, is of the required form. The complainant insists, however, that these taps are not anticipations of the patented taps, because they are not of requisite thickness, and that nothing is a tap sole, within the meaning of the patent, which is not an extra sole having a definite degree of thickness, relatively, to the main sole. In the language of the complainant's counsel, "nothing is a tap sole, within the meaning of this patent, except an extra sole, which is so heavy or stiff, relatively, to the weight or stiffness of the main sole, that, if it terminate abruptly at or about the place where the shank begins, the bending strain produced by walking will be localized there by reason of the difference of pliability between the part covered by the extra sole and the shank of the boot or shoe." In the language of complainant's expert: "Whenever in a rubber boot a difference in the thickness of the sole is such as to tend to separate the tap or break the sole, then the extension of

the superimposed thickness on the sole to a point of rest under the shank is the invention of Flynn and covered by his patent."

There is nothing in the specification which, in terms or by inference, makes the thickness of the tap sole a constituent of the invention. It is there suggested that a tap is started from the main sole by the strain in walking, which comes across the place where the main sole joins the shank, and that one of the advantages of the improvement is that the tap will make the boot as serviceable as one with an entire double sole. As the strain in walking may be affected by the thickness of the main sole, as well as by that of the tap sole, and as, in any event, the thickness of the tap will only effect a difference in degree, the first of these suggestions throws no light upon the point. The other is equally indecisive, because a double sole is only an extra sole, and if it gives additional wearing capacity to the boot, may be of any degree of thickness.

The essence of the invention is in the form or shape of the tap sole, by which the objections to the old tap sole are obviated. When it is ascertained what is meant by a tap sole, as that term is addressed to those skilled in the art to which the invention appertains, it only remains to consider whether, in other respects in form and mode of fastening, the anticipating article negatives the novelty of the invention. The expert for the complainant has given a satisfactory definition of the term "tap sole," and one which is supported by the testimony of other witnesses. He states, in substance, that while there are variations in thickness, absolutely or relatively to the main sole, the tap sole must always have "sufficient thickness to form a practical additional thickness to the main sole, which will endure practical wear and service," and "add to the wearing capacity of the main sole."

Applying this test to the exhibits introduced by the defendant, which have been referred to, they embody the tap sole of the patent. They are quite distinguishable from the "rough soles" cemented to the main sole, such as are shown by the exhibits known as "Carew's World's Fair." They are extra soles of sufficient thickness to impart a very sensible degree of stability to the main sole and add to the wearing capacity of the shoe. While these soles were adapted only to prevent slipping, that circumstance is not material, except to suggest a closer scrutiny of the articles in order to see if they really have features which were not designedly adopted. The exhibit "New Brunswick, 1860 to 1870," shows very clearly a practical extra sole of requisite thickness. The extra soles of the New Brunswick Rubber Company are as thick, absolutely and relatively to the main sole, as those shown in some of the boots of the complainant's manufacture, which are stamped by complainant as patented under the patent in suit. This circumstance is not controlling, but it is significant as tending to show the construction which the complainant, by its officers, has sometimes placed upon its own patent, and that the thin-

ness of the extra sole has not always been regarded by them as material.

As has been stated, there is nothing in the specification to indicate that the invention is for anything but a tap sole, without regard to thickness, absolutely or relatively, to the main sole. But the proofs show that the very thing the patentee designed to remedy—the tendency of the tap to start at the place where it joins the shank—was a defect in thin soles as well as in thick, and existed in the thin extra soles which were in use, before the date of Flynn's improvement. These extra soles were no thicker than those of the "Hayward German Shoe" and the "New Brunswick, 1866," according to the testimony of complainant's witness Mr. Jaquith. Some were probably thinner. The invention was as applicable to those thin soles as to thick ones, though doubtless the defect to be remedied was more serious when thick soles were used.

Referring again to the statement of the complainant's expert that the invention is found "whenever the thickness of the sole is such as to tend to separate the tap or break the sole," (the form of the patent being adopted,) it follows that it is anticipated by the thin extra soles of the form and fastened to the main sole, as shown in the exhibits mentioned.

Finally, it may be said that, although Flynn's form is more advantageous when used in a thick extra sole than when it is used in a thin one, his improvement is one of degree only; and, in view of the fact that this form, as applied to thin extra soles, was old, the improvement is destitute of patentable novelty.

A decree is ordered for the defendant.

LALANCE & GROSJEAN MANUF'G Co. v. UNITED STATES STAMPING Co.

(Circuit Court, D. Connecticut. May 19, 1885.)

PATENTS FOR INVENTIONS—NOVELTY—BISCUIT-PANS.

Patent No. 96,605, for "an improved mode of uniting small biscuit-pans together in clusters, consisting in providing the pans with horizontal flanges and riveting them," *held void for want of novelty.*

In Equity.

Charles E. Mitchell, for complainant.

Charles R. Ingersoll, for defendant.

WALLACE, J. The invention covered by the claim of the patent in suit as described in the specification "relates to an improved mode of uniting small biscuit pans together in clusters, and consists in providing the pans with horizontal flanges around the tops, and joining them together by lapping the flanges and riveting them." Biscuit

pans assembled and united in clusters were old when the patentee first made them. Several modes had been adopted for uniting them. One was by assembling the pans on a sheet of tin in the desired contiguity, each pan being riveted through the bottom to a sheet. Another mode was by riveting the pans to a strip or bar of metal instead of a sheet, and uniting the several strips or bars. In other instances the sheet and bar were dispensed with, and the pans were united by rivets through their sides near the rim; and in others still, the edge of one pan was lapped and seamed over the edge of the adjacent pans.

It is testified to, and seems probable, that single flat-flanged biscuit pans, made of tin, were old. The patent contemplates pans of sheet-metal. But if flanged pans were new when made of tin or sheet-metal they were old when made of cast-iron. As shown in the patent to Waterman, granted April 5, 1859, pans of cast-iron were united in clusters by a cast connection, which was substantially a flange around the rim of each pan, extending from the rim of each pan to the flange upon the rim of the adjacent pan. This being the prior state of the art, the defense of want of novelty is fatal to the patent. The ordinary skill and judgment of the mechanic, with the prior structures before him, would suggest that such pans could be made with flanges and united by rivets through the flanges, if he desired to avoid inserting a rivet through the body of the pans. The Waterman structure alone would suggest the mode of the patent. As the flanges of that structure were united in the process of casting and could not be so united when sheet-metal was to be used, the obvious way to unite them in sheet-metal would be by lapping and riveting or soldering the flanges.

The bill is dismissed.

PATTEE PLOW Co. v. KINGMAN and others.¹

(Circuit Court, E. D. Missouri. March 2, 1885.)

1. PATENTS—NOVELTY.

Letters patent No. 187,899, issued to J. H. Pattee, February 27, 1877, for an improvement in cultivators' axles, are void for want of novelty.

2. SAME—UNDUE EXPANSION OF ORIGINAL CLAIM.

The second claim of J. H. Pattee's reissued patent No. 6,080, for an improvement in cultivators, expands the original patent beyond legal limits, and is void.

3. SAME—INFRINGEMENT.

Letters patent No. 174,684, issued to T. W. Kendall, March 14, 1876, for a pivoted runner attached to a cultivator, is not infringed by a jointed runner which cannot be kept out of contact with the ground by the draught of the team.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

In Equity.

This is a suit for the alleged infringement of four patents owned by the complainants, viz.: Letters patent No. 138,148, issued to J. H. Pattee, January 21, 1873; reissue No. 6,080, dated October 6, 1874, and being a reissue of original patent No. 124,218, issued to J. H. Pattee, March 5, 1872; original patent No. 174,684, issued to T. W. Kendall, March 14, 1876; and original patent No. 187,899, issued to J. H. Pattee, February 27, 1877,—all for improvements in cultivators. Patent No. 135,148 was left out in making up the proofs, so that the case stood for hearing on the other three.

Reissue No. 6,080 is for an improvement in tongueless cultivators. The second claim, which is the only one here in question, is as follows:

"The axle, A, hinged to the wheel spindle or draught plate, B, B, so that the wheels are retained in the line of progression by the draught of the animals, when one is in advance of the other, substantially as described, and for the purpose specified."

Complainant's counsel urged that this second claim is the same as the first claim of the original patent, which is as follows:

"The axle, A, having plates, B, hinged to the wheel spindle plates, C, so that the wheels are retained in the line of progression when one is in advance of the other, as set forth."

On the part of the defense it was insisted that this second claim had been enlarged by the omission of the plates, B, so as to make the peculiar axle, any axle, and that the operation stated in the claim was changed, if not defeated, by the insertion in the reissue specification of the words, "The draught animals may be attached *direct* or by any suitable device," the direct hitch leaving either or both wheels to get out of the line of progression. In complainant's machine the beams are attached to the draught-plates, C, of the original patent, which became the draught-plates, B, of the reissue. The defendant's machine had the direct hitch, with the draught-plates at the extreme sides of the machine, and the plow-beams attached to the horizontal portions of the axle. The description in the reissue was more in accordance with the construction of the machine shown in the 1873 patent, which was dropped out, than it was in accordance with the original, so far as the devices of this claim are concerned, thus leaving, as was contended, the claim enlarged by omissions from the original claim, and by additions to the specification.

Infringement was also claimed as to the first and second claims of the Kendall patent, which were for runners pivoted to the wheel spindles or axle, so as to be held out of contact with the ground by the draught of the team when the machine was used for field operations, and to be held in contact with the ground when the plows were suspended from the axle for transportation. The defendant's machine was provided with hinged runners, which were folded up by

hand for field operations, and folded down and locked for transportation.

The Pattee patent, No. 187,899, is for a method of constructing the arch in parts, which construction was shown to be old in coupling-yokes for cultivator beams, in trusses, and various other devices.

John R. Bennett and George Harding, for complainant.

West & Bond, for defendants.

TREAT, J. Reissued patent 6,080 of 1874, second claim of which is under consideration, has, as to that claim, expanded the original beyond legal limits. Therefore said reissued patent is void to the extent claimed, wherein the defendant is alleged to have infringed.

2. As to Kendall patent No. 174,684 there is no infringement.

3. As to Pattee patent of 1877, No. 187,899, said patent is void, there being no novelty of invention therein that is patentable.

Bill dismissed, with costs.

THE PROFESSOR MORSE.

(District Court, D. New Jersey. May 8, 1885.)

1. ADMIRALTY JURISDICTION—LOCALITY AS TEST.

In all cases of maritime torts the locality of the act is the test of admiralty cognizance; and whether the court has jurisdiction in any case depends upon whether the wrong and injury complained of was committed on the high seas, or navigable waters.

2. SAME—INJURY TO MARINE RAILWAY—LIBEL DISMISSED.

The marine railway claimed to have been injured in this case, as described in the libel, was not at the time of the injury a floating structure, and within the admiralty jurisdiction. *The Plymouth*, 3 Wall. 20, followed, and *The Arkansas*, 17 FED. REP. 383, distinguished.

In Admiralty.

Bedle, Muirheid & McGee, for libelants.

Goodrich, Deady & Platt, for respondents.

NIXON, J. This is a proceeding *in rem*. The defendant steamer has been libeled for an alleged maritime tort, to the damage of the libelants' marine railway. On the return of the monition the respondents appeared and took three exceptions to the libel filed in the case: (1) Because it did not state facts sufficient to constitute a maritime claim or lien against the vessel; (2) because the court has no jurisdiction to proceed against the vessel in the manner in which the same is sought to be proceeded against by libel; (3) because the alleged injury done to the marine railway and cradle, and the alleged damages resulting to the libelants by reason thereof, were not done, caused, or suffered upon the water and within the ebb and flow of the tide, but were alleged to be done upon the land; and that the court had no jurisdiction in the case.

The libel was filed by the owners of a marine railway at Clifton, Staten island, and state of New York, against the steam-ship Professor Morse, to recover damages sustained in a collision; it being alleged that the railway was injured by reason of the vessel dragging an anchor across the ground-ways thereof, to which anchor she had been fastened against the remonstrances of the libelants. The exceptions, reduced to their ultimate analysis, present simply the question of jurisdiction.

In all cases of maritime torts, the locality of the act is the test of admiralty cognizance, and whether the court has jurisdiction, in any case, depends upon whether the wrong and injury complained of was committed upon the high seas, or navigable waters. It was held by the supreme court in *The Plymouth*, 3 Wall. 20, that in ascertaining whether a tort was maritime or not, it was of no importance that it was committed by a vessel; the locality, and not the character of the instrument which perpetrated the wrongful act, determined the question of admiralty cognizance. Following this case, Judge BLATCHFORD, in *The Maud Webster*, 8 Ben. 547, held that, in applying this criterion of jurisdiction, to-wit, the locality of the tort, we must ascertain the locality of the thing injured; and not of the agent by which the injury is done.

The thing injured, in the present case, was a marine railway. If the offense was committed and consummated on the water, a maritime lien is held to exist, and can be enforced in the admiralty against the vessel; but if upon the land, the only remedy is a common-law action for the tort against the owners. *The Neil Cochran*, 1 Brown, Adm. 162; *The Ottawa*, Id. 356; *The Rock Island Bridge Case*, 6 Wall. 213.

It is therefore necessary to inquire whether the marine railway (the property of the libelants) was, in fact or in law, at the time of the injury, a floating structure, or a part of the land. The libel alleges that it was a marine craft or vessel, and that it was altogether within and under the water of the bay of New York, and within the ebb and flow of the tide. Are there any other allegations which contradict this?

It is then stated that the railway consists of ground-ways laid on piles and loaded with ballasts, but not fastened by any fastening to the piles, and running from the engine-house of said marine railway down to and under the waters of the bay of New York, and out towards the channel of said bay and to the bottom thereof, to a distance of about 700 feet; that said ground-ways are about 13 feet and 6 inches wide,—the flooring thereof resting on the piles and constructed of heavy oak plank; that the track is made of Georgia pine, and runs the whole length of the ways, each track being about 14 inches wide and 12 inches high from the floor; that there are two iron plates on the top of each track, running its whole length, five inches wide and three-quarters of an inch thick, and four inches apart,—making a groove

for the shoulder of each roller to fit in; that on these tracks are a series of rollers set in a roller-box each one being 19 inches long, and so cut as to have a journal 2 inches long at each end, which is set in holes in the roller-boxes; that on the roller-boxes rests a cradle, with heel-blocks and bilge-blocks, capable of removal and substitution at pleasure, on which a ship can be conducted from the water to the shore; that a sheave is fastened to the flooring of the ground-ways under water near the lower end; that an iron cable is attached at pleasure to the in-shore end of the cradle and carried up to a pulley on the shore, and then passed back around the pulley, under the water, to the said sheave on the floor of the ground-ways; that said cradle sits upon the rollers by its own weight, and can be moved back and forth at the will of the engineer; that the roller-boxes with the rollers rest upon the ground-ways by their own weight, and move backwards and forwards with the cradle, but at a rate of only one-half as fast; that the ground-ways, with the exception of one end, are under tide-water, and the cradle, roller-boxes, and rollers traverse and move from the extreme lower end of the ground-ways up through the water until they reach the shore, and that the whole railway is so arranged that the roller-boxes, with the rollers and cradle thereon, can be let down into and under the water in the bed of the bay, and while there a vessel can be floated on the cradle, and placed in position, by means of the keel and bilge-blocks, and pulled to the shore by the chain cable above referred to.

After such description of the railway mechanism, the libel proceeds to state the tort for which the suit is brought, as follows: That on the evening of July 22, 1884, the steam-ship Prof. Morse came to the dock of the libelants for the purpose of being hauled out on said railway to be repaired, and lay along-side of a pier on the north side of the ways, between the ways and the pier, and was made fast by lines in the following manner: one line from her bow to a pile; another line from the foremost chains to another pile, and a spring line from the after-part of the vessel to a pier. That in the water, at some distance north of the steam-ship, was a buoy attached to an anchor, which was used by the libelants to mark a distance from the location of the ways, and to this anchor she made fast another line from the afterpart of the vessel; that this was done between 6 and 7 o'clock in the evening, when the libelant John J. Lawler and his brother James were there, who at once remonstrated with the captain against making fast to said buoy or anchor, and told him that the anchor was not put there for any such purpose, but merely for marking an adjusting point for a vessel on the ways, and that if any of his lines parted, the steamer would drift and drag said anchor attached to the buoy down to and under the ways, and destroy them. That notwithstanding this protestation the captain persisted in making fast to said buoy. That at half-past 11 o'clock the same night libelants again went to the steam-ship, and urged the master to remove the line from

the buoy, offered to furnish him with a hawser, and showed him how he could fasten to the pier in such a way as to be safe; but the master declined to accept the hawser, and refused to remove the line from the buoy, or to make fast in any other way. That libelants went there the next morning, and found that the vessel had drifted considerably to the south, and was lying in a quartering position, with her stern over the water, under which the ground-ways were located, and the buoy was on the south side of the vessel, over the ground-ways. That before libelants undertook to haul out the steam-ship, they inquired of the master whether the anchor of the buoy had dragged to the ground-ways, and stated that if it had, it would be unsafe to haul out the vessel, as the ground-ways were probably injured by the dragging of the anchor, and that the captain assured the libelants that the anchor had not touched or injured the ground-ways. That thereupon the cradle and roller-boxes were put in position under the vessel, which was floated upon them; the keel-blocks and bilge-blocks arranged, the engine started, and the cradle and rollers, with the vessel thereon, began the journey towards the shore; that when her prow was six or seven feet out of the water, and the stern was drawing about three feet of water, the vessel suddenly keeled over at the prow towards the north, and carried away the roller-boxes, and the tracks of the ground-ways, and bent the same out of plumb, so that it was impossible to move the rollers, cradle, or vessel either towards the shore or the water, and the whole usefulness of the machine was destroyed. That it required large expense, and 18 days of hard labor, to get the steam-ship off the railway. That the railway was damaged to the amount of \$6,500; that the costs of removing the vessel exceeded \$2,000; that libelants should be paid demurrage at the rate of \$30 a day for at least 120 days; and that all of said damage was caused by the perverseness, negligence, and want of skill and good management of the captain and crew of the said steam-ship, and not from any want of care and diligence on the part of the libelants.

From this description of the structure it can hardly be doubted that it was not, in any proper sense, a craft or vessel intended to float on the water. The upper end was securely fastened to the land,—as much so as a wharf built out into the stream,—and its character is not changed because the ways ran down below the ebb and flow of the tide, to facilitate the transfer of vessels from the water to the shore. *The Maud Webster*, 8 Ben. 547, was a stronger case for the libelants; but in that case Judge BLATCHFORD, after argument and reargument, dismissed the libel for the want of jurisdiction. The libel was there filed against a schooner for injuries to a derrick and tackle which libelant had erected in Long Island sound, to be used in the construction of a pier for a government light-house. He had built a circle of rip-rap about 70 feet in diameter. The interior was open down through the water to the soil at the bottom of the sea, except where a ring of stone was built up to a line above the surface of

the water. At low water men could stand on the bottom inside of the ring. A temporary derrick was erected, consisting of an upright, the lower extremity of which rested on the soil inside of the rip-rap, and the upright rose through the water and was steadied above by four wire guys, which were extended to a distance, and were anchored to the soil at the bottom of the water outside of the rip-rap. The injury was caused by the schooner striking one of these guys. It was urged that the place where the accident occurred was on the high seas, and not within the limits of any state, and was therefore not on the land; that as it occurred in the midst of the water, it should be considered as having happened upon the water; that the derrick was only there temporarily, and was resting on the bottom of the high seas; that such bottom was not land; and that the property injured should be regarded as personal property upon the water. Judge BLATCHFORD, in his second opinion, after the reargument, said, page 555:

"I cannot regard the injury to the libelant's property as having occurred on the water in the sense of the decisions above cited, although, in one sense, it occurred in the water, because it occurred at a place in the midst of or surrounded by the waters. The property was not in use for purposes of navigation, and was none of it afloat, and was all of it supported by direct pressure on the soil of the earth."

The only case which seems to conflict with this view is the able and discriminating opinion of Judge LOVE in *The Arkansas*, 17 FED. REP. 383. Although not necessary for the decision of the case before him, he distinctly holds that where a structure, whether solid or floating, is lawfully erected in the navigable bed of a river, and is injured by a collision caused by the negligent management of a vessel, the owner of such structure may proceed in an admiralty court by action *in personam* against the owner of the vessel, or *in rem* against the vessel itself. However much I might be inclined, if the question were an open one, to follow this *obiter dictum* of the learned judge, I am constrained, by the authority of *The Plymouth*, 3 Wall. 20, to hold, in the present case, that the libelants have mistaken their court, and that the remedy for the injury complained of is to be found only in the courts of common law. The libel must be dismissed.

THE ALBERTA.

(District Court, E. D. Michigan. February 23, 1885.)

1. COLLISION—NEGLIGENCE—EVIDENCE.

In attempting to gather the actual facts of a collision from the contradictory testimony of witnesses, the following rules of construction should be borne in mind: (1) The testimony of the crew of each vessel, with regard to her course, and the various orders given to and executed by the wheelsman and engineer, should be credited in preference to the testimony of an equal number of witnesses upon another vessel relating to her movements as they appeared to them;

(2) the probability that a vessel, bound from one headland to another, will take the usual and direct course between them is so strong that a deviation from such course, without adequate cause, ought to be established by the clearest preponderance of evidence.

2. SAME—STEAMERS' SIGNALS—MUTUAL, FAULT.

Where two steamers were navigating the most frequented waters of Lake Superior by night and in a dense fog,—one running at the rate of 10 miles, and the other at the rate of 6 miles, per hour,—and each heard several signals from the other, indicating that they were approaching each other upon opposite or crossing courses, and a collision occurred between them, *held*, that both were in fault for excessive speed.

3. SAME—DUTY TO STOP.

Quere, whether it was not the duty of both steamers, under the circumstances, to stop their engines until their relative positions were clearly ascertained. If not bound to stop, it was at least incumbent upon them to proceed at the lowest rate of speed compatible with the maintenance of steerage-way.

In Admiralty.

On libel and cross-libel for a collision between the steam-barge John M. Osborn and the Canadian steam-ship Alberta, which occurred about half past 9 o'clock in the evening of July 27, 1884, from eight to ten miles to the northward of Whitefish Point light, in Lake Superior. The Osborn was bound on a trip from Marquette, in the state of Michigan, to Ashtabula, in the state of Ohio, laden with a cargo of 1,120 tons of iron ore, and had in tow, with the usual length of tow-line, the schooners Thomas Gawn and George W. Davis, in the order named, both laden with iron ore.

The libel averred that about 9 o'clock in the evening, while a dense fog was prevailing, and the Osborn was proceeding at a low rate of speed, blowing her steam-whistle, at intervals not exceeding one minute, and observing all proper precautions, a fog-signal was heard from a steamer, which proved to be the Alberta, about two points off the Osborn's starboard bow; "that immediately the fog-signal was sounded by the Osborn, and she continued her course, repeating her fog-signal at proper intervals; that while thus proceeding, and several minutes after the first, the Osborn heard a second fog-signal from the Alberta, which seemed to come from a point still broader off the starboard bow of the Osborn, whereupon the Osborn starboarded one point, and sounded a distinct signal of two blasts of her whistle to indicate her course to those in charge of the Alberta, and continued thereafter to repeat the fog-signal; that no response was made by the Alberta to said signal of two blasts, nor did the Alberta sound her fog-signal except at long and unusual intervals; that the Alberta's fog-signal was thereafter sounded, and seemed to come from a point still more off the starboard side of the Osborn, and the latter gave a distinct signal of two blast of her whistle, and continued her fog-signals as before; that no response was made by the Alberta, but the Alberta, having proceeded to a point well off on the Osborn's starboard beam, gave an imperfect, muffled sound of her whistle, and suddenly appeared through the fog close at hand; that she was then rapidly swinging to starboard across the course of the Osborn, coming at a very high rate

of speed; and, although the Osborn sounded again the signal of two blasts of her whistle, and ordered her wheel hard-a-starboard, to lessen, if possible, the effects of the collision which was then inevitable," before she had commenced to swing, the Alberta struck her with great force on the starboard side, just abaft the mizzen rigging, cutting half way through her, so that, in consequence of her injuries, the Osborn sank in about five minutes, with her cargo, and with three of her crew and a passenger of the Alberta, who was then on the Osborn, all of whom lost their lives.

The Alberta was bound on a voyage from Owen sound, on Georgian bay, to Port Arthur, on the north shore of Lake Superior, laden with passengers and a cargo of general merchandise. The case on her behalf, as set forth in the cross-libel, was that when some five or six miles to the northward and eastward of Whitefish point, and while she was proceeding slowly, and at about the hour of 10:15 P. M., there being a fog upon the water, and while she was sounding her proper fog-signals, the fog-whistle of another vessel was heard well off the port bow, and apparently at some distance; that in some four or five minutes afterwards the whistles were again heard, and also other whistles were heard apparently from another vessel. Both whistles were from vessels ahead, and apparently well off to port; that the Alberta was then, and for some time previously had been, running under a check in consequence of the fog, but on hearing the said whistles she immediately slowed down to not more than half speed, and was kept steadily and carefully on her course, her fog-signals continually sounding, and while she was so running the fog-signals were again heard, and broader off the port bow. Again, in three or four minutes, the whistles were heard, and almost instantly thereafter the head-light and the starboard side-light of a vessel, which proved to be the barge Osborn, were made near by, heading across the bows of the Alberta to starboard; that the engine of the Alberta was immediately reversed at full speed, but so short was the time and distance that the collision with the barge was then inevitable, and soon afterwards occurred, the Alberta striking the Osborn on her starboard side, well aft by the mizzen rigging, at something less than a right angle, etc.

H. H. Swan and H. D. Goulder, for libelant.

W. A. Moore and F. H. Canfield & Cramer, for cross-libelant.

BROWN, J. This collision was evidently caused by a misapprehension upon the part of the officers of each vessel with regard to the course of the other. The officers of the Osborn, as well as those of her schooners in tow, and the officers of the steam-barge Hecla, which was following behind her, heard, or thought they heard, the first whistle of the Alberta, from one to two points off their starboard bow, the second and third whistles still broader off, and the last one, an imperfect, muffled sound, well upon the Osborn's starboard beam. These signals indicated to them that the Alberta was on a substantially par-

allel and opposite course, and would pass safely up the lake on their starboard hand. This theory, however, cannot be true, unless we reject entirely the testimony of the officers and wheelsman of the Alberta, and believe that she was at least three points off her proper course, and bound to some port on the south shore of the lake instead of to Port Arthur, upon the north shore. Upon the other hand, the officers of the Alberta heard the whistles of the Osborn apparently off their port bow, and were so fully satisfied that each successive whistle was broader off the port side, that, as Capt. Anderson expressed it, "he expected to hear the next whistle abaft his beam." Yet the fact is not disputed that the Osborn was actually crossing his bow, but it was learned too late to avoid the disaster. Without expressing a decided opinion upon the trustworthiness of the expert testimony, which tended to show that a practiced ear can determine within a point the bearing of a whistle in a fog, the facts of this case demonstrate that this is a very uncertain method of ascertaining the course of an approaching vessel, when the hearer is himself upon another vessel moving rapidly in a different direction.

In attempting to gather the actual facts of a collision from the contradictory testimony of witnesses it should be borne in mind: (1) That the testimony of the crew of each vessel, with regard to her course and the various orders given to and executed by the wheelsman and engineer, should be credited in preference to the testimony of an equal number of witnesses upon another vessel relating to her movements, as they appeared to them. (2) That the probability that a vessel, bound from one headland to another, will take the usual and direct course between them is so strong that a deviation from such a course, without adequate cause, ought to be established by the clearest preponderance of testimony. Gauged by these rules, the angle at which these vessels approached each other is readily ascertained. The proper course from Marquette to Whitefish point is E. $\frac{1}{2}$ N., but on account of the fog that evening, and to give the headland a wider berth, the Osborn deviated half a point to the northward, making her actual course, as sworn to by her officers and wheelsman, E. by N. Upon the other hand, the compass course from Whitefish point to Port Arthur is N. W. by W. $\frac{1}{4}$ W., but to keep clear of vessels coming down the lake, Capt. Anderson ordered his wheelsman to pursue a course N. W. $\frac{1}{2}$ W. for one hour after passing Whitefish Point light. I have no doubt the collision occurred at or very near the intersection of these courses. As the two steamers were meeting at an angle of only four and a half points, and the Alberta struck the Osborn at an angle of one point greater or less than a right angle, (and whether it was greater or less, the evidence is conflicting,) there is a difference of from three and a half to five and a half points to be accounted for. That the Osborn starboarded one point just before the collision is averred in her libel, and proved by her testimony; and I have a strong impression that the Alberta, at about the same time, ported her wheel

two or three points to give the Osborn a wider berth. It is true, her officers made no mention of this, but it is indicated by the angle at which the vessels came in contact, and also by the testimony of the Osborn's crew that the Alberta seemed to be approaching them upon a swing to starboard. The testimony of the Osborn's crew, the shape of the cut, the appearance of the Alberta's bow as she lay in the dry-dock after the collision, and the fact that the Osborn's line was snapped by the collision, all indicate that the blow was delivered from behind rather than from forward, and such I am inclined to think was the fact, although there is considerable testimony to the contrary.

If the Alberta did port in ignorance of the actual position and course of the Osborn, it was a fault for which she ought to be condemned. It is one of the elementary rules of navigation that a vessel ought never to alter her helm in ignorance of the position and course of an approaching vessel. It is true that by such change she may escape a collision, but the chances are equal that she will bring it about. Instead of experimenting, it is her duty to stop, and sometimes to reverse. *The James Watt*, 2 W. Rob. 270, 277; *The Bougainville*, L. R. 5 P. C. 316; *The Franconia*, 4 Ben. 181, 185; *The Shakespeare*, 4 Ben. 128; *The Lorne*, 2 Stuart, Vice Adm. 177; *The Scotia*, 5 Blatchf. 227. I do not find it necessary, however, to express a decided opinion as to the guilt of the Alberta in this particular, since she was so clearly at fault for maintaining an excessive speed that her case is hardly susceptible of argument. She was navigating the most frequented waters of Lake Superior. Almost the entire commerce of the lake takes its course to or from Whitefish Point light. It was night, and there was a fog prevailing so dense that the headlight of a vessel could be but dimly seen at a distance of 600 feet. The fog-signals of at least two steamers were in plain hearing, and bearing somewhat ahead. These signals indicated, in language well understood on the lake, that both steamers were incumbered by tows. All her surroundings called for the utmost caution; yet she was proceeding at such a speed that the force of the collision drove her stem about half way through the Osborn, making a wedge-shaped hole 16 feet in depth, by 12 feet in width. Under these circumstances it is useless to argue that the testimony of the master and engineer of the Alberta shows that she was proceeding under a slow check. The wound itself is the one fact which outweighs all the other evidence. It cannot be argued or explained away. I am satisfied from the testimony of the experts as to the weight and momentum of the respective vessels that she must have been proceeding at a speed of at least 10 miles an hour. It is hardly necessary to say that this is not the moderate rate of speed which the rule requires.

There was an equal obligation on the part of the Osborn to maintain a moderate rate of speed. She was not only encompassed by similar perils, and warned by like signals of the approach of another steamer, but these signals indicated that the Alberta was upon her starboard

bow, and hence that if the two steamers should turn out to be upon crossing courses, it would be incumbent upon her, under the nineteenth rule, to avoid the Alberta from the moment she became visible, except, perhaps, so far as this obligation might be modified by the fact that the Osborn had two vessels in tow. It is true that she assumed that the Alberta was upon a course substantially parallel to her own, but she had no right to act upon such an assumption in disregard of the settled rules of navigation, or to the extent she might have done had the Alberta been visible and exhibiting her green light. Her running time from Marquette shows her general speed that day to have been about seven miles per hour. No order was given to run under a check when the fog arose or when the signals were first heard; and the only evidence that she was not proceeding at her usual rate is contained in the statements of the master and engineer, that the latter was instructed to let his fires run down a little, as they would necessarily be delayed until daylight in Waiska bay. This probably reduced her speed from one to two miles an hour, so that we are safe in assuming that she must have been running at from five to six miles per hour. A like rate of speed was condemned in the case of *The Colorado*, 91 U. S. 692, in which the supreme court adopted the language used by the privy council in the case of *The Batavier*, 9 Moore, P. C. 286. Indeed, the law seems to be now well settled that that is only a moderate rate of speed which will enable a steamer to be kept under ready control, and to be stopped in time to prevent a collision with other vessels, provided such vessels themselves make use of proper signals to notify other vessels of their proximity. *The Western Metropolis*, 7 Blatchf. 214; *The D. S. Gregory*, 2 Ben. 166; *The Louisiana*, 2 Ben. 371; *The Monticello*, 1 Holmes, 7. At first blush, I had some doubt whether the fault of the Osborn in this particular could be said to have contributed to the collision. The presumption is that it did. It is true that the blow was delivered by the Alberta, but this was a mere accident. If both were running at an excessive speed, the speed of both must have contributed to the collision, since if either had been proceeding at a lower rate the collision in all probability would not have occurred. While I should be unwilling to say that rule 21 absolutely demands a moderation of speed at all times and under all circumstances whenever a fog arises, the obligation unquestionably attaches whenever the signals of an approaching vessel are heard from a point where, whatever the course of such vessel may be, there is any risk of collision. It is possible that the fact that the Osborn had two vessels in tow might have relieved her of the duty of giving way to the Alberta, but it certainly did not relieve her of the necessity of so moderating her speed as to keep herself under complete control. I think she must be adjudged guilty of contributory negligence in this particular.

Indeed, I am strongly inclined to think that both these vessels were in fault for not stopping altogether and drifting until their respect-

ive signals indicated clearly that they had passed each other. In the recent case of *The John McIntyre*, 5 Asp. Mar. L. C. 278, it was held by the English court of appeal that where the officers of a steamship, in a dense fog, hear the whistles of another vessel more than once on either bow, and in the vicinity, from such a direction as to indicate that the other vessel is nearing them, it is their duty at once to stop and reverse her engines, so as to bring their vessel to a standstill in the water. This was a collision between the steamships *Monica* and *John McIntyre*, in the North sea. The *Monica* was conceded to have been in fault. It was alleged on behalf of the *McIntyre* that the whistle of the *Monica* was heard about four points on the port bow, and then heard twice again, and thereupon the engines of the *McIntyre* were reversed full speed astern. The court found that this was not done with sufficient promptness, and that, from the character of the blow delivered by her, the *McIntyre* must have been going at a considerable rate of speed at the moment of collision. The court held it to have been the duty of the *McIntyre*, under the circumstances, not merely to slacken her speed, but also to stop and reverse. In delivering the judgment of the court, the master of the rolls observed:

"If a steamer in a thick fog—so thick that she can hardly see before her—hears another vessel in her neighborhood on either bow, not being able to see her, and she herself not going at her slowest pace, the question is whether, under those circumstances, the officer in charge of the steamer ought not to conclude that it is necessary, in order to avoid risk of collision, that he should stop and reverse? I do not hesitate to lay down the rule, not strictly as a matter of law, but as a matter of conduct, that the moment such circumstances as these happen, it is necessary, under the article, to stop and reverse. * * * However difficult it may be for persons in command of steamers to do what the law directs, in my opinion, we must hold strictly that in a dense fog the moment another vessel is found on the bow, or in near vicinity on either bow, and she herself is going at any speed, it has then become necessary, under the eighteenth rule, not merely to slacken speed, but instantly to stop and reverse."

In this case the court appears to have taken a decided step in advance of prior decisions, and I am not prepared to say that the rule therein laid down, in so far as it demands not only a stoppage, but a reversal of the engines, should be rigidly applied to every case of steamers meeting under the circumstances stated. At the same time, it seems to me entirely proper and reasonable to hold that when steamers are approaching each other in a fog so dense that a vessel can be seen only a few hundred feet, there is a "risk of collision" which makes its obligatory upon both to stop their engines and drift, until such risk is determined.

The case of *The McIntyre* differs from the one under consideration, if at all, only in the fact that the officers of the *Osborn* thought, from the signals of the *Alberta*, that she was upon an opposite and parallel course and would pass in safety. This, however, was a mere conjecture. The officers of each vessel must have known that the other

was upon an opposite or upon a crossing course, and that there was risk of collision, until they were fully assured by the signals that each was astern of the other. So long as there was any doubt upon this subject; so long as the whistles of the other continued to be heard forward of the beam, it was their duty to act upon the supposition that there was still risk of collision, under the twenty-first rule. The following comments of the court in the *McIntyre Case* are pertinent in this connection:

"It was the whistle of the other vessel which told him, not exactly where she was, but about where she was, and that she was in a position in which he could not consider her an absolutely safe vessel in regard to him; *i. e.*, he could not consider that he had passed her or that she had passed him either ahead or astern. While he was not at once bound the moment he heard the whistle, wherever it might be, to stop and reverse his engine; but having heard the first whistle, which was about four points on the port bow, he hears another and another whistle; and I cannot help thinking that the evidence shows that it was something like three or four whistles that he heard."

Now, without expressing a decided opinion in this case, whether, under the circumstances, it was the duty of these vessels to stop and reverse, I am clearly of the opinion that it was incumbent upon them either to stop, or to proceed at the lowest rate of speed compatible with the maintenance of steerage-way.

Neither of these steamers was provided with such a lookout as the exigencies of the case required. Both of them were under charge of the master and second mate, who stood together, on the bridge in the one case, and in front of the pilot-house in the other. Neither vessel had a lookout forward or aloft, or in other position where his opportunities of observation were better than those of the officer of the deck. It was held in the case of *The Colorado*, above cited, that steamers, while navigating in dense fogs, should carry at least two lookouts, and if there had been any evidence that a want of this precaution had contributed to this collision, I should have felt bound to condemn the steamers for this omission. But as each appears to have discovered the other as soon as it was possible to do so, I am not prepared to say that either should be condemned on that account.

A decree will be entered adjudging both vessels in fault for excessive speed, dividing the damages, and referring the case to a commissioner to assess and report the same.

THE ALPIN. (Nine Cases.)

(District Court, E. D. New York. December 30, 1884.)

1. STRANDING OF VESSEL—NON-PRODUCTION OF WITNESSES—PRESUMPTION.

The steam-ship A., while on a voyage from Inagua, Bahama islands, to New York, was stranded on the coast of Maryland. In actions brought on her bills of lading to recover for the loss and damage to cargo resulting, *held*, that the non-production, without sufficient excuse, of any one of the numerous persons who were on board as crew and passengers at the time of the stranding, as witnesses, to explain the circumstances of the stranding, except the chief engineer, who was below at the time, warrants a presumption that, if they had been produced, they would have shown the stranding to have been the result of negligence in the navigation of the ship.

2. SAME—NEGLIGENT NAVIGATION—FAILURE TO SOUND.

That when it appeared that on January 19th the master supposed himself to be in latitude 36 deg. 40 min., longitude 74 deg. 10 min., and the next day, at 1:25 A. M., was on a bar four miles north of Green Run inlet, the weather being thick, and no explanation was given of the vessel's course meantime, *held*, that if her course was directly between those two points, it was clearly negligence; and that if the master supposed himself on the 19th to be in that latitude and longitude, it was his duty to verify his supposition by sounding; and that the failure of the ship to deliver her cargo was caused by this negligence.

3. LEX LOCI CONTRACTUS.

Where the *lex loci contractus* is neither pleaded nor proven, it is presumed to be the same as the law of the United States.

4. AVERAGE ADJUSTMENT—ARBITRATION.

The making of an average statement by average adjusters is not an award by arbitrators.

In Admiralty.

Scudder & Carter (Lewis Cass Ledyard) and Sidney Chubb, for libellants.

Wheeler & Souther, (Everett P. Wheeler,) for claimants.

BENEDICT, J. These actions, tried together, are brought upon bills of lading to recover damages for the failure to deliver, in like good order, at the port of New York, cargo, in the bills of lading mentioned, shipped on board the steam-ship Alpin. On January 15, 1883, the steamer above mentioned, bound for New York, left the port of Inagua, having on board a cargo of assorted merchandise, consisting in large part of coffee and hides. On the morning of January 20, 1883, a few minutes after 1 o'clock, she stranded some four miles north of Green Run inlet, on the coast of Maryland, upon a bar running along about 300 yards from the beach. As soon as the vessel struck, some cargo was thrown overboard, and an effort to work the vessel off the bar by running her engines full speed astern having failed, all on board left her and went on shore. The following night the steamer came in over the bar, and on Sunday morning was lying in an easy position, so high up on the beach that her officers walked to her, and her mails were landed from her into an ox-cart backed up to her side for that purpose. On Monday an agent of the owners arrived and took

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

charge of the steamer and her cargo. The sea continuing smooth, under his direction all the cargo, except about 150 tons, was put over the side and carted up on the beach, and on the 24th the steamer was hauled off the beach by tugs and proceeded to New York. The loss and damage to the cargo amounted to \$82,000. The value of the steamer was \$48,000.

To recover for the loss and damage to the portion of the cargo owned by the above-named libelants these actions are brought upon their several bills of lading, similar in legal effect. They claim to recover upon two grounds: *First*, that the stranding of the steamer was caused by negligence on the part of those engaged in her navigation; *second*, that after the stranding, unnecessary loss and damage to their merchandise was caused by the neglect and wrongful conduct of the agent of the owners, under whose directions the cargo was taken out of the vessel, after she had grounded on the beach.

By far the greater part of the testimony is directed to the action of this agent in respect to the cargo, and this testimony certainly presents some remarkable facts. But I find it unnecessary to consider that branch of the case to which the testimony referred to applies, for the reason that I am satisfied that it is my duty to hold the vessel liable for the loss and damage sustained by the cargo in question upon the ground that the stranding of the steamer was caused by the negligence of those at the time in control of her navigation.

The condition of the testimony upon this branch of the case is extraordinary. On the voyage in question, and at the time of the stranding, there were on board the steamer, officers and crew, 29 persons, besides two passengers. Of these, the chief engineer, who was below when the vessel stranded, is the only witness called by the claimants; and this, notwithstanding it appears that the captain and the chief officer of the steamer have been in New York, and in communication with the owners since the commencement of these actions. The only excuse offered for this important omission to call these officers to explain their navigation of the steamer is that the libels do not charge that the stranding was caused by negligence, and the claimants were therefore justified in assuming that the circumstances attending the stranding would not be the subject of inquiry, and so allowed the master and crew to depart without taking their testimony. But the claimants knew that the stranding of their vessel was to be their defense; and their course in relying for proof of the stranding upon the admissions in the libels and the testimony of witnesses who, while knowing of the stranding, could not know how it was caused, when the testimony of those who would be the natural witnesses to prove such a defense was at command, indicates the existence of a reason other than that of surprise for the non-production of these witnesses, and warrants a presumption that if the officers of the steamer had been called, they would have shown the stranding to have been the result of negligence in the navigation of the ship.

It is to be also noticed that some of the libels do not admit the stranding, and that the libels in which a stranding is admitted couple the admission with the statement that it arose "from causes to your libellant at present unknown," while the answers deny negligence. Moreover, after the libelants' testimony showing negligence was put in, no application was ever made for time to procure the testimony of the officers of the steamer. Little room is therefore left to contend that the failure to produce any of the crew of the steamer is to be excused on the ground of surprise.

The inquiry in regard to the cause of the stranding opens, therefore, with the presumption that the testimony of the officers of the steamer would show that the stranding was caused by their negligence, in addition to which there are facts proved from which negligence must be inferred without the aid of this presumption. The captain's protest is put in evidence by the libelants, and manifestly contains the entries in the steamer's log-book for several days prior and up to the stranding. The log-book itself, although called for by the libelants, is not produced, but it was conceded that the protest showed the entries in the log on the days mentioned.

From this protest it appears that for several days prior to the stranding the vessel had been run by dead reckoning; that the weather had been thick, and, for some hours before the stranding, so thick that the engines were slowed and the whistles blown; and that at no time was the lead thrown. It is true, the protest does not say that the lead was not thrown, but it omits to state that it was thrown, and this omission, under the circumstances, compels the inference that it was not thrown; and this inference is confirmed by the fact that the chief engineer does not state that his engine was stopped at any time until the stranding.

The protest also shows that on the nineteenth of January the master supposed his position to be, latitude 36 deg. 40 min.; longitude 74 deg. 10 min. It is also evident that some time before the stranding the vessel had passed out of the Gulf Stream. In regard to the course upon which the vessel was sailing when she stranded, or indeed at any other time, there is no testimony. No courses whatever are given by the protest, or stated by the chief engineer. According to the protest, however, on January 19th, the vessel was in latitude 36 deg. 40 min., longitude 74 deg. 10 min., and on the next day at 1:25 A. M. she was on a bar four miles north of Green Run inlet. If a line between these two points shows the course of the steamer at the time she ran ashore, a clear case of negligence is made out; for such a course was directly on the land, and to hold such a course in thick weather, without sounding, until the vessel struck, would be gross negligence.

If, then, the inquiry were rested at this point, I know not that the claimant would have cause to complain; for, according to the protest, such was the vessel's course, and no officer of the steamer is called to

say that the steamer was upon a different course, or that she was supposed to be upon a different course, or to say that the location of the vessel on January 19th, as given by the log, is an estimated position, arrived at by dead reckoning, and not the actual position of the vessel on that day.

But, giving to the claimant the benefit of a presumption that the master would not knowingly put his vessel upon such a course, and considering the statements of the protest in regard to the weather, coupled with the evidence as to where the steamer actually struck the shore, to be sufficient to warrant a conclusion that the vessel was sailing by dead reckoning, and that the location of the vessel on the 19th, as given by the log, represents no more than a mistaken conclusion of the master that such was his position, when, in fact, he was close in upon the coast; still it must be held that the cause of the stranding was the omission to throw the lead, and that such an omission, under the circumstances, was negligence. For if the master, on the 19th, supposed himself to be in the locality stated in his protest, and knew, as he must be presumed to have known, that he had already crossed the Gulf Stream, when on the afternoon of the 19th the weather grew so thick as to make it prudent to slow the engines and blow his whistle, it became the duty of the master to verify his supposition as to his location by sounding. He knew land was under his lee. He knew that the wind, as it was, would carry him towards the land. He also knew, or ought to have known, that he might be under the influence of a current running towards the land. Moreover, the weather was thick, and he knew that he did not know his position, and that an approach to the land would be indicated by the soundings. Under such circumstances common prudence required him to sound. Had he observed this common and, under the circumstances, necessary precaution, the lead would have informed him that he had been mistaken as to his position, and was sailing close to the lee shore; and with this knowledge he could have prevented the accident that shortly occurred.

It is said that the master was not bound to sound because he had passed Hatteras 50 miles off, and on that course soundings would be useless. If it be conceded that the steamer in fact passed Hatteras 50 miles off, it is not seen how the vessel could have stranded where she did without a negligent change of course. But the truth is that the steamer did not pass Hatteras at a distance of 50 miles, and instead of being well off shore was sailing so close that the wind and sea carried her sufficiently to leeward to bring her on the bar, the question, therefore, is not whether the master supposed, from his dead reckoning, that he was at a safe distance from the land, but whether he was justified in proceeding, in thick weather, upon that supposition alone, with means at hand to test the accuracy of his supposition. I think he was not justified, and was guilty of negligence in so doing.

It is suggested that the master may have been misled in regard

to his position by a deviation of his compass. There is proof that no ordinary deviation of the compass will account for the stranding, and there is no evidence of any deviation whatever. If there was a deviation of the compass, it would have been easy to prove it; and if the master's reliance upon his compass was the cause of the stranding, that too might have been easily proved. Surely such things cannot be presumed in the absence of the master's testimony.

The conclusion I have now stated is supported by the opinion of several master mariners of large experience on this coast, who concur in saying that it was negligence in this master not to use his lead under the circumstances stated in his protest. My determination upon this branch of the case, therefore, is that the failure of the claimants to deliver the libelants' goods was caused by negligence on the part of those navigating the steamer.

I pass now to consider the position taken by the claimants that the libelants cannot recover the damage resulting from this negligence, because liability arising from the negligence of the captain, or the agent of the owner, is excepted by the terms of the bill of lading, and that this exception is valid according to the law of the place where the contracts were made. The answer to this position, sufficient for this case, is that the *lex loci contractus* is neither pleaded nor proven; and the presumption is that it is the same as the law of the United States, which is adverse to the validity of such an exception in bills of lading.

Lastly is to be noticed the contention of the claimants that the action of the average adjusters in making up an average statement, pursuant to average bonds executed by the libelants, was an award made upon a submission to arbitrators, and finally determined the present controversy. This contention is based upon what appears to me to be a novel idea respecting the effect of an average bond. No case is cited where an average bond has been treated as a submission to arbitration, and the adjustment as the award of arbitrators; nor am I able to discover any reason for giving such an effect to these commercial acts. Average bonds and average adjustments are not new, and it is late now to discover that the adjustment by average adjusters is an award by arbitrators pursuant to a submission to arbitrators, and conclusive as such upon all who have signed the average bond. In my opinion, such a view of the transaction is wholly untenable. It would seem to be contrary to the decision of the supreme court in the case of *The Niagara*, 21 How. 9, in which the answer set up "an agreement not only to share the damage, but that the goods should be charged with, and pay their proportion of, a general average of the losses thus occasioned."

The views I have already expressed render it unnecessary to consider the interesting question whether the method pursued in lightening this vessel when on the beach, resulting, as it did, in a loss of cargo nearly double the total value of the vessel, was justified by the

surrounding circumstances. Upon that question, therefore, I intimate no opinion, but rest my determination upon the ground that the stranding of the vessel was caused by negligence on the part of those in charge of the vessel at the time.

Let decrees be entered in favor of the various libelants, with an order of reference to ascertain the amount.

THE PERSIAN MONARCH.¹

GOLDSMITH v. NORTH GERMAN LLOYD, etc.¹

(District Court, E. D. New York. September 17, 1884.)

SALVAGE—OWNER OF CARGO ON SALVING VESSEL AND CARE-TAKERS OF CARGO NOT ENTITLED TO SALVAGE OR DAMAGES—PUBLIC POLICY.

The owner of cargo shipped on board a vessel which, by reason of rendering a salvage service to another vessel on the voyage, is delayed, and whose cargo is thereby damaged and deteriorated, is not by that mere fact made entitled to a salvage remuneration from the vessel to which the service was rendered. Such an allowance would be against public policy. Nor is he entitled to recover damages from the salvaged vessel, either for a tort or for a breach of contract. Men employed by the shipper as care-takers of such cargo (which consisted in this case of live-stock) are not entitled to a salvage award, when they took no part in the actual salvage service, but merely were compelled to perform the duties for which they had been hired during the time the voyage was delayed.

In Admiralty.

Butler, Stillman & Hubbard, for libelants.

Shipman, Barlow, Larocque & Choate, for defendant.

BENEDICT, J. This action is brought by Meyer Goldsmith, the owner, and Dan Kalahr, Eugene Kalahr, and John H. Topham, the care-takers of certain cattle and sheep shipped by Goldsmith on board the steam-ship *Persian Monarch*, to be transported therein from New York to London. The defendant is the owner of the steam-ship *Hannover*, which vessel, when disabled at sea, was fallen in with by the *Persian Monarch* during the voyage aforesaid, and by her towed into a port of safety.

The libel sets forth the bill of lading under which the cattle and sheep were shipped, containing the following clause:

"The steamer has liberty to sail with or without pilots, to make deviation, to call at any port or ports for any purpose, and to tow and assist vessels in all situations."

It then describes the services rendered the *Hannover*, and avers that the rendition of those services necessarily put in peril the sheep and cattle shipped, and subjected their owner to expense in maintaining

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

them for a longer period than otherwise would have been required, and to loss by reason of the death of some, and the depreciation in value of the remainder, owing partly to their being kept for so long a time in confined space, and partly to their being fed reduced rations, as well as to loss by reason of losing a market by the delay.

The libel also avers that Dan Kalahr and Eugene Kalahr were employed by Goldsmith to take care of the said sheep and cattle during the voyage, and by reason of the rendition of the salvage services aforesaid, they were compelled to give the cattle and sheep greater care and attention than otherwise would have been required of them. John H. Topham sets forth the same by way of petition to be made a co-libelant. The prayer of the libel is that the court would "decree to the libelant Meyer Goldsmith the sum of \$15,000, or such other sum as this court deems proper and reasonable, and to the libelants Dan Kalahr and Eugene Kalahr such sum as is proper and reasonable in the premises," and for such other relief, etc.

The view I take of the case renders it unnecessary to say more in regard to the proofs offered in support of the libel than that they show that while performing the voyage in the libelants' bill of lading described, the Persian Monarch fell in with the steam-ship Hannover disabled at sea, and at her request took her in tow and brought her in safety to the port of Falmouth, whence the Persian Monarch proceeded to London, where she arrived some five days later than she would if the voyage had been performed in the ordinary time of a voyage from New York to London. The length of the voyage caused a deterioration of the sheep and cattle, owing to a lack of full rations of food, and to a crowding of the cattle and sheep, rendered necessary in order to make room to attend to the cables by which the Hannover was towed, and 15 of the sheep died. The libelants Dan Kalahr and Eugene Kalahr and the petitioner, John H. Topham, were 3 of 15 men put on board the Persian Monarch by the shipper of the cattle and sheep to feed and care for them during the voyage. These men were hired by the run, and the length of the voyage entailed upon them additional labor in caring for and feeding the cattle and sheep. The libelant Goldsmith was not on board the Persian Monarch, and had nothing personally to do with the towing of the Hannover. His cattle and sheep in no way contributed to the successful performance of the services rendered the Hannover. On the contrary, they were, if anything, a hindrance.

These facts show that beyond all question a salvage service of importance was rendered by the Persian Monarch to the Hannover on the occasion referred to, and the first question to be considered is whether the shipper and owner of the cattle and sheep on board the Persian Monarch was one of the salvors on that occasion, and as such entitled to recover of the owner of the Hannover a salvage reward.

In behalf of the shipper, it has not been contended that the bare fact of ownership on board a salving ship gives a right to share in

salvage when awarded, but it is contended that the owner of cargo on a salving ship, who consents to the rendition of the salvage service, is entitled to share in the salvage, when he, by consenting, assumes a risk which, in the absence of his consent, would be borne by the salving ship; and, it is claimed in the libellant's behalf that the clause already quoted from the bill of lading given for the cattle and sheep was a consent by him that the Persian Monarch should tow the Hannover as she did, and that such consent put the sheep and cattle at the shipper's risk, and so entitles the shipper to recover salvage. In support of this position two decisions are cited. They are the case of *The Blaireau*, 2 Cranch, 240, decided by the supreme court, and the case of *The Colon and her Cargo*, 10 Ben. 60, decided by the district court of the southern district of New York. Reference is also made to the case of *The Nathaniel Hooper*, 3 Sum. 542.

The case of *The Blaireau* was a case where the owner of a cargo of salt on the salving vessel, the Firm, was allowed to share in the salvage awarded. This allowance Judge PETERS (*The Ship Cato*, 1 Pet. Adm. 67) speaks of as "a remuneration not common, if ever made before;" and whether the decision was "for general direction or only as it respects that particular case," he considers open for determination. The case of *The Blaireau* had this peculiar feature that one of the owners of the cargo, whose acts were held to bind the other owner of the cargo, was on board the Firm at the time she saved the Blaireau, and this owner not only took an active part in the labor attendant upon the service, but, as the opinion indicates, was called on to consider, and did consider, and assent to, the measures taken by the master of the Firm to effect the salvage. Moreover, I gather from the case that the salvage service would not have been undertaken by the master of the Firm if the owner of the cargo on board had not approved the measures intended to be adopted to save the Blaireau. This act on the part of the owner of the cargo was something more than a mere waiver of any right of action against the Firm because of a deviation. It was an express assent to measures intended to be taken to save the Blaireau, given under circumstances that rendered the assent an essential prerequisite to the service. Such I understand the case of *The Blaireau* to have been, and so understood, it furnishes no authority for the decision of this case. Neither can authority for the decision in this case be found in the opinion delivered by Judge STORY in the case of *The Nathaniel Hooper*. In that case it was found that no consent was given by the owner of the cargo. The nature of a consent which would, in the opinion of that learned judge, afford ground for the owner of the cargo to share in salvage was not determined, except that the consent must be an express consent to the deviation made, and a consequent release of the shipowner from his responsibility therefor.

If, in the case at bar, there had been an express consent by the shipper of the cattle and sheep that the master of the Persian Mon-

arch do what he did to save the Hannover, the remarks of Judge STORY in the case of *The Nathaniel Hooper* would have been more in point. The decision in the case of *The Nathaniel Hooper* does, however, point out that the mere fact of owning property put at risk is not sufficient to confer the right to share in salvage, and shows that the owner of the ship is allowed to share in the salvage upon grounds of public policy, as well as upon the ground that the cargo has been put at his risk. Another ground is stated by Judge BETTS, (*The Waterloo*, Blatchf. & H. 114,) namely, that the property of the ship-owner is the instrumentality by which the salvage is effected. None of these auxiliary grounds for an award exist in the libellant's case. The libellant was not on board the Persian Monarch, knew nothing of the Hannover's application for assistance, and was not impelled by her distress to relinquish any right or to assume any additional risk. The form of his bill of lading is not shown to have been known by the master of the Persian Monarch, nor did it in any way conduce to his determination to assist the Hannover. The master, as it must be presumed, arrived at the determination to assist the Hannover from a sense of the duty owing by him to the distressed vessel,—a duty created by the circumstances, and which would have been the same if the libellant's bill of lading had contained an agreement on the part of the ship never to render assistance to a vessel in distress.

The consent given in the case of *The Blaireau*, as well as the consent referred to in the case of *The Nathaniel Hooper*, is, in my opinion, to be considered as a consent given at the time of the rendition of the salvage service, and under circumstances showing that without such consent the salvage service would not have been undertaken. The case at bar discloses no such consent.

As to the other decision relied on by the libellant, (the case of *The Colon*,) that is a decision directly adverse to the libellant's claim, considered as a claim for salvage, for although there was in that case a bill of lading containing a clause similar to that in the libellant's bill of lading, the claim for salvage was rejected. In that case the clause in the bill of lading was held to have no effect upon the shipper's right to salvage, because the bill of lading was a contract between the shipper and his ship alone. To this extent I agree with the decision in the case of *The Colon*. The libellant's bill of lading is, as I conceive, nothing more than his contract with the owner of the Persian Monarch. In it he gave to the Persian Monarch liberty to assist any vessel in distress, and for this waiver he received a consideration in the rate of freight paid by him. It is a mere waiver, and nothing more.

If, then, the form of the libellant's contract with the Persian Monarch has no effect upon the liability of the owner of the Hannover, the libellant's claim for salvage is left to rest upon the bare fact that the rendition of the salvage service to the Hannover increased the libellant's risk in the cattle and sheep on board the Persian Monarch.

Such a fact standing alone has never, so far as I know, been held to be foundation for a claim for salvage, and, indeed, has not been here claimed to be sufficient.

A second ground upon which salvage has been claimed in behalf of the libelant is the co-operation in the salvage service of the cattle-men employed by him to take care of the cattle and sheep during the voyage. But the salvage service consisted in the towing of the steam-ship Hannover by the steam-ship Persian Monarch. The libel does not aver that the cattle-men took part in that service. These men took care of the cattle and sheep as they had agreed with the shipper to do. The rendition of the salvage service by the Persian Monarch did not entitle them to demand extra wages of the libelant, and, so far as appears, they have asked no extra compensation of him. In fact they are here claiming on their own behalf as salvors compensation for their services in caring for the cattle and sheep. Their labors performed under such circumstances can have no effect upon his right to claim salvage of the Hannover.

In what has been said the effort has been to show a distinction in principle between the shipper's consent, proved in the case of *The Blaireau*, and alluded to in the case of *The Nathaniel Hooper*, and the waiver embodied in the libelant's bill of lading. But if there is no distinction in principle between the case of *The Blaireau* and the case at bar, then a distinction must be made upon the ground of public policy. Public policy, which is the sole and the good ground upon which salvage is awarded in any case, requires that salvage should not be awarded in a case like this, for the reason that to award it is to sow the seed of death to the law. It would open a door for every shipper of cargo, and every passenger as well, to claim a share in any salvage award that might be earned by their ship. If, in former times, when ships were small and cargoes of little value, it was possible to allow shippers of cargo to share in the division of salvage, such allowance is no longer possible. The vast steamers of the present day carry cargoes valued by millions, and their passengers are numbered by thousands. If all these are to share in the distribution of salvage, the amount coming to the master, who alone decides whether a salvage service is to be rendered, and to the mariners, whose personal exertions are in general necessary to success in any salvage adventure, will be so small as to furnish no inducement to undertake the service, and so the reason for awarding salvage will fail. The same considerations of public policy which impel to the allowance of salvage therefore require that in the distribution of salvage neither shippers of cargo, nor passengers on board the salving ship, can be allowed to participate.

Thus far this case has been treated as a cause of salvage, civil and maritime. But the averments of the libel perhaps require that the cause be only considered as not one of salvage, but an action for damages. The decision in the case of *The Colon*, already referred to, is in

favor of such an action, but I am by no means able to follow that decision. If the shipper of these cattle and sheep has a right of action against the owner of the Hannover to recover damages for the detention of his property, such right must arise out of a tort or the violation of an agreement. Surely the owner of the disabled Hannover committed no tort when he accepted the services of the Persian Monarch to bring him to a place of safety. And what contract did he make with the libelant when he accepted those services? It is said that a contract between the libelant and defendant to pay the resulting damages is to be implied from the detention of the libelant's cattle and sheep in their voyage. But the defendant knew nothing of the libelant, or that he had cattle and sheep on board the Persian Monarch. He knew the Persian Monarch carried cattle and sheep, but, for aught that he knew, they were the property of the master with whom he was dealing. It was the master of the Persian Monarch who detained the Persian Monarch and her cargo in the voyage, not an agent of the owner of the Hannover, nor yet the mere bailee of the libelant's property, but the master of the ship; "not an ordinary agent, but one of a special kind—*sui generis*," (*The Thetis*, 22 Law T. Rep. 276;) "a known and public officer," (2 Pet. Adm. appendix, 75,) charged with important duties, not the least important of which are those attaching upon the meeting a vessel in distress at sea. He it was who delayed his ship in order to rescue the Hannover, and he must answer to the libelant if he invaded any right of the libelant by so doing. His answer has been made easy by the form of the libelant's bill of lading, but it is not easier than the answer of the owner of the Hannover, who can truly say to the libelant: "I had no control over the Persian Monarch or her voyage. I never dealt with you nor with your property."

The decision in the case of *The Colon* has sometimes been treated as if in that case salvage had been awarded under the name of damages. But the law is not evaded by a change in name, nor was there an attempt in the case of *The Colon* to evade it in that way. The decision was that salvage could not be recovered, but there could be a recovery of damages for the violation of an implied promise to pay the owner of the cargo of the sailing vessel the damages resulting from their detention. I am unable to agree to such a conclusion. It seems to me that it is adding a new horror to shipwreck to hold that when the master of a vessel in distress accepts the services of another vessel for his rescue, he binds his owners to the owners of the cargo of such other vessel,—and not only to the owners of the cargo, but to the passengers as well,—by a contract to pay them all damages resulting from the rendition of the salvage service. Such cannot be the law.

I have now stated reasons which, to my mind, are sufficient to compel a dismissal of the claim of the libelant Goldsmith, and it is therefore unnecessary to consider the other and weighty matters set up in

defense. What has been said in regard to the claim of the owner of the sheep and cattle refers with equal force to the men employed by him to care for his cattle during the voyage. These men hired out to the shipper by the run, taking the risk of the master of the Persian Monarch's determining to run his vessel slow or fast during the voyage. The fact that the Persian Monarch ran slow during part of the voyage, in order to assist the Hannover, gives to these men no right to claim of the owner of the Hannover compensation for a service in which they do not claim in their libel to have taken any part.

The libel is dismissed, and with costs.

THE CITY OF ALEXANDRIA.¹

(District Court, S. D. New York. March 20, 1885.)

DAMAGE TO CARGO ON LIGHTER—NEGLIGENCE—CUSTOM IN STOWAGE—PERIL OF THE SEA.

A lighter was loaded at Havana with bales of tobacco, to be taken to a steamer lying out in the harbor. The bales were piled three high above the gunwale, and were not secured in any manner. On the way a sudden gust of wind caused the lighter to careen, and some of the bales fell into the sea. Though damaged by water, they were afterwards received on board the ship, and a clean bill of lading given for them, reciting them to have been received in good order and condition, both parties having knowledge of the facts. On the arrival of the ship in the port of New York, suit was brought against her for the damage to the bales. *Held*, that assuming, but without deciding, that the goods taken by the lighter were in the possession of the ship, it was incumbent on the libelants, under the exception of "perils of the sea" in the bill of lading, to show negligence on the part of the lighter; that the evidence showed that the cargo was stowed in conformity with the established usage of the port, and that the bales slid off in consequence of a sudden gust of wind, which was extremely rare; and that, therefore, the loss was by a peril of the sea, and no negligence upon the evidence could be imputed to the lighter, and consequently none to the steamer, even though the lighter were in the steamer's employ, and the loss must be set down to the exceptions in the bill of lading.

In Admiralty.

Butler, Stillman & Hubbard and *Stillman & Mynderse*, for libelants.
A. O. Salter & R. D. Benedict, for claimants.

BROWN, J. The libel, in this case, was filed to recover \$5,120.47 damages for the non-delivery in good order and condition of 399 bales of tobacco, brought from Havana to New York, by the steamer City of Alexandria, in March, 1883. Eighty-six of the bales were damaged by falling into the water, while in course of transportation on a lighter from the pier in Havana to the steamer, about half a mile distant. The bales weighed about 100 pounds each, and were three feet square. The lighter was without deck. There were three tiers piled below the gunwale, and three above. While the lighter was crossing to the

¹ Reported by R. D. and Edward Benedict, Esqs., of the New York bar.

steamer, a strong gust of wind from the hills, according to the testimony, caused the lighter to careen, so that some of the upper bales, which were very dry and slippery and not secured, slid off into the water. They were picked up and put on board the steamer the following day, and a clean bill of lading given for them by the agents of the ship, reciting them to have been all received on board ship in good order, both parties having knowledge of the facts.

To entitle the libelants to recover, inasmuch as the damage to the tobacco was not done after it was received on the ship's deck, and as the bill of lading also excepts perils of the seas, it is incumbent on the libelants to show that the injury arose from negligence of the lighter, and also that the possession of the lighter was the constructive possession of the steamer; in other words, that the transportation by the steamer in legal effect commenced at the wharf.

In most of its features the case of *Bulkley v. Naumkeag Steam Cotton Co.* 24 How. 386, is very similar to the present. There the vessel was held liable for injury to cotton while on board the lighter. In that case the lighter was unquestionably employed by the master of the ship, and at the ship's expense. The court say:

"Both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in Mobile, and to be transported thence to the port of discharge. After the delivery and acceptance at the place of shipment the shipper had no longer any control over the property, except as subject to the stipulated freight."

The court, accordingly, held "that the vessel was bound from the time of the delivery to the captain by the shipper at the city of Mobile and its acceptance by the master; and that the delivery to the lighterman was a delivery to the master, and that the transportation by the lighter to the vessel was the commencement of the voyage, the same, in judgment of law, as if the hundred bales had been placed on board of the vessel at the city instead of the lighter; and that the lighter was simply a substitute for the bark for this portion of the service." Page 391.

In the present case the questions chiefly litigated were, who employed the lighter, and in whose legal possession was the tobacco when on board the lighter? On the part of the ship, it is contended that the lighter was not employed by the steamer, her master, or agents; and that the tobacco was not in the possession or control of the ship, actual or constructive, until actually delivered on board by the lighter.

There is no direct evidence as to what was the actual arrangement or understanding, between this steam-ship line and the lighterers in Havana. The lighterage was a separate charge of six cents per bale, and entered in the margin of the bill of lading as a distinct charge, to be collected in addition to the freight *eo nomine*. But it is clear that there must have been some understanding, or arrangement, between the owners of the steam-ship line and the lighterers, from the fact, which clearly appeared in proof, that, by the well-established

usage and understanding at the pier, all light cargo, such as this, destined for the line to which this steamer belonged, was to be lightered at certain established tariff rates by the lighters of Mendez & Co., to whom this lighter belonged, unless the shipper arranged specially for lighterage in a different manner; which, it is said, he had the option to do, although that option appears not to have been generally understood.

The evidence taken at the trial is, in the main, circumstantial evidence bearing upon the question whether the lighter was to be deemed employed by the ship, or by the shipper. I shall not pursue this part of the case further, because the other question of negligence on the part of the lighter lies at the threshold of the libelants' case; and upon this question, as the evidence stands, I do not feel warranted in decreeing for the libelants. *Prima facie* it would seem to be negligence, and gross negligence, that bales, very dry and slippery, should be piled three tiers high above the gunwale, and have no protection by lashing, when they are liable to slide off into the water if the lighter is tipped a little by a gust of wind. But the testimony on the part of the lightermen is explicit that these goods were lightered in the usual way; that the cargo was of the customary amount; that it is not usual in Havana to lash or secure the bales; that the bales were no more slippery than usual; and that such accidents were extremely rare, as he had only known three or four such in a long experience.

I confess, indeed, to much doubt of the entire accuracy of this testimony. A custom not to secure slippery bales piled above the gunwale would seem to be merely customary negligence. But how can this court, at this distance, and without further proof of the circumstances, and in the absence of any contradiction of the respondents' testimony, affirm that such an established custom is *ipso facto* negligence, and therefore void as a defense? The harbor, except in extremely rare instances, may be smooth and quiet; the lighters may be built so stiff as to have very great stability in the water; and the amount of sail used may be so slight, as possibly to make reasonable and justifiable the alleged usage of dispensing with any lashing or fastening of bales piled a certain distance above the gunwale. The reasonable sufficiency of the alleged customary mode of loading must therefore depend upon the circumstances of the port and the country, of which this court certainly has no judicial knowledge, and which the evidence does not disclose. If, as appears from the respondents' evidence, the lighter was in this case loaded in the usual manner, and none of the customary precautions were omitted on their part for the safe lightering of the tobacco, and the bales under such circumstances slid off in consequence of a sudden gust of wind, which was extremely rare, (see *Wardsworth v. Pacific Ins. Co.* 4 Wend. 33, 38,) then the loss was by a peril of the seas, and no negligence can be imputed to the lighter, and consequently none to the steamer, even though the lighter were in the steamer's employ; and the loss must

be set down to the exceptions in the bill of lading. It is sufficient to rebut the charge of negligence to show that the stowing was in conformity with the established usage of the port. *Shear. Neg.* § 6; *Baxter v. Leland*, 1 Blatchf. 526; *Lamb v. Parkman*, 1 Spr. 343, 351; *The Titania*, 19 FED. REP. 101, 107, 108; *The Geo. Heaton*, 20 FED. REP. 323; *The Chasca*, ante, 156.

If I were to hold the steamer in this case, she ought to have a remedy over against the lighter in Havana. It would be unjust to charge the steamer upon evidence that would exempt the lighter in a suit there. Much as I may doubt the accuracy of the evidence given concerning the alleged custom of Havana, or, if some such custom exists, whether this lighter was loaded in conformity with it, I cannot feel warranted in disregarding the positive evidence given, in the absence of all other proof to the contrary. I am reluctantly constrained, therefore, to dismiss the libel, leaving the libelants to their remedy against the lightermen in Havana, or to such further proof as they may make upon appeal in the circuit.

THE MARY R. MCKILLOP.¹

(District Court, E. D. New York. October 3, 1884.)

TOWAGE—NEGLIGENCE—BREACH OF CONTRACT—DEVIATION.

A canal-boat sprang a leak while in tow of a tug, and thereafter sank. *Held* that, although the leak was probably caused by the boat's coming into contact with a floating piece of ice, still, as the proofs did not show a failure on the part of the tug to use due care and skill, the tug could not be held liable for the boat's sinking. It was not a breach of the towing contract for the tug to take another barge in tow, and land her at another place, during the same voyage, since it appeared from the circumstances that this was in accordance with the parties' understanding of the contract, and was, therefore, not a deviation. The libel against the tug for the sinking of the boat was therefore dismissed.

In Admiralty.

Carpenter & Mosher, for libellant.

Hyland & Zabriskie, for claimant.

BENEDICT, J. The master of the canal-boat Robert Henry agreed with the master of the tug Mary R. McKillop to be towed by the tug from Newtown creek to Hoboken. The towage was agreed to be seven dollars, because of ice in the rivers. The tug took the canal-boat along-side, and afterwards took a barge astern, to be landed at the Cunard wharf in the North river, and also a lighter to be landed in the North river. After the lighter had been landed in the North river, and when proceeding in the East river, ice was met. The tug proceeded up in the clearest part of the river until she approached

¹Reported by R. D. & Wylls Benedict, Esqs., of the New York bar.

the Cunard dock. Then she hauled in towards the New York piers, and on reaching the Cunard dock landed the barge. Thence she proceeded to Hoboken with the libelant's canal-boat.

Before the landing of the barge at the Cunard dock the libelant's canal-boat sprang a leak, from what her master supposed, and no doubt correctly, to have been contact with a piece of ice. The leak increased, and finally after the boat had been landed at Hoboken she sank.

Assuming that the cause of the boat's sinking was coming in contact with ice while the tug was hauling towards the New York docks in order to land the barge, it is still necessary, in order to charge the tug with the sinking of the boat, that it be proved that the canal-boat was brought in contact with the cake of ice by some negligence on the part of the tug. The proofs show no such negligence. There is no evidence of any failure on the part of the tug to exercise due care and skill throughout the voyage. If, then, any liability on the part of the tug exists, it must arise from a breach of the towing contract. The libelant contends that the towing contract was for a voyage from Newtown creek to Hoboken direct; that the tug deviated from this voyage to land the barge at the Cunard wharf; and that the sinking of the boat was owing to injuries received by her in the course of this deviation, for which the tug is consequently responsible. But I am unable to hold that to take the barge in tow and land her at the Cunard wharf was a breach of the towing contract made with the libelant. When the contract to tow the canal-boat to Hoboken was made, nothing was said about going direct, nor about taking other boats in tow at the same time, and although the barge, as well as a lighter, were taken on immediately after the canal-boat was alongside, no objection was made by the captain of the canal-boat to the taking of these boats. From these circumstances I infer that the taking of the barge in tow was in accordance with the parties' understanding of the contract made to tow the libelant's boat, and if so, it was not a deviation to land the barge at the Cunard dock.

The libel must therefore be dismissed, and with costs.

THE WISCONSIN.¹

(District Court, E. D. New York. January 6, 1885.)

COLLISION—STEAMER AND BARK—MISTAKE AS TO LIGHTS—FLARE-UP—BLUE LIGHT—PILOT SIGNAL.

Where a steamer was approaching a bark in the night, and the bark exhibited a flare-up light, which was seen on the steamer, and those on the steamer supposed the other vessel to be a pilot-boat desiring to put a pilot on board, and the steamer showed a blue light, to which the bark replied by a flare-up, and the steamer did not discover her mistake until too late to avoid a collision, *held*, that, besides the fact that the green light of the bark was proved to be so dim as to render it invisible to the steamer at a distance sufficient to enable her to avoid the bark, which of itself was sufficient to prevent a recovery by the bark, it was also a fault on the part of the bark to exhibit the flare-up after the steamer had burned the blue light; and as there was no fault proved on the part of the steamer, the bark's libel against the steamer was dismissed.

In Admiralty.

Scudder & Carter and Owen & Gray, for libelants.

Beebe & Wilcox, for claimants.

BENEDICT, J. The cause of the collision which gave rise to these actions was the opinion formed by those in command of the steamer that the lights exhibited by the bark were the lights of a pilot-boat desiring to put a pilot on board the steamer, when in fact the lights were those of a bark holding her course. The night was dark, but good for seeing lights. The bark exhibited a flare-up light, which was seen by those in charge of the steamer in abundant time to avoid the bark, and from that time the lights of the bark were watched with the aid of glasses as well as with the naked eye by several competent persons on board the steamer, including the master, and all supposed the light to be the flare-up of a pilot-boat until the bark was too near to enable the steamer to avoid the collision.

The case is not one of an inattentive lookout on the steamer, but one where the lookout saw the light, and was misled by it; and the question of the case is whether the opinion that the approaching vessel was a pilot-boat, which was formed and acted upon by those in charge of the steam-ship, was justified by the circumstances. If so, the steam-ship cannot be held in fault.

In addition to the flare-up light shown, the bark carried a green side light. This light was seen by those on board the steamer, but not until it was too late to correct their mistake in regard to the character of the approaching vessel, and when collision was inevitable. The testimony in regard to the green light of the bark, in connection with evidence of the lantern itself, warrants the conclusion that the light was so dim as to render it invisible to the steamer at a distance sufficient to enable the steamer to avoid the bark. This condition of the bark's green light is of itself sufficient to prevent a recovery by the bark.

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

But another fault on the part of the bark also appears. It is proved, and not disputed, that when the bark displayed her flare-up light to the steamer, the steamer burned a blue light. This blue light was seen on board the bark, and replied to by a flare-up. It was not a fault in the bark to display the flare-up that was displayed before the blue light was burned, but it was fault to display a flare-up after the blue light of the steamer was seen, for the blue light was notice to the bark that her flare-up had been taken by the steam-ship to be the flare-up of a pilot. It was also notice to the bark that she was seen by the steamer. There was no need, therefore, for the bark exhibiting the flare-up a second time, and the action of the bark in answering the steamer's blue light with a flare-up was, under the circumstances, equivalent to notice from the bark to the steam-ship that the approaching vessel was a pilot-boat, intending to put a pilot on board the steamer. In this way the mistaken opinion of those on board the steam-ship was confirmed by the bark, when, as I cannot doubt, the absence of a reply to the steamer's blue light would have corrected the mistake and prevented the collision.

It is said that the steam-ship, even if she supposed the approaching vessel to be a pilot-boat, had no right to run her down; but, the steam-ship, led by the bark to believe that she was a pilot-boat desiring to put a pilot on board, had the right to come close to the supposed pilot-boat, and to believe that the pilot-boat would also draw near to her, and to assume that any one of that active class of vessels would co-operate with her in the effort to bring the vessels close to each other in safety. When, therefore, the steam-ship burned a blue light and slowed down, and changed her course nearer to the supposed pilot-boat, and stopped her engines and backed on discovering her mistake, she did all that it was possible for her to do under the circumstances to avoid running down the bark, and was guilty of no fault.

My conclusion therefore is that the collision in question was caused by fault on the part of the bark, and not by fault on the part of the steamer.

Let the libels be dismissed, and with costs.

FULLER, Assignee, etc., v. WRIGHT.

(Circuit Court, W. D. Pennsylvania. May 20, 1885.)

REMOVAL OF CAUSE—ASSIGNMENT FOR BENEFIT OF CREDITORS—FEIGNED ISSUE TO TRY VALIDITY OF JUDGMENT—PENNSYLVANIA STATUTE—CITIZENSHIP.

A feigned issue granted at the instance of an assignee for the benefit of creditors in Pennsylvania to try the validity of a judgment recovered by a creditor, which it is claimed was fraudulent as to the other creditors, is removable into the circuit court when such judgment creditor is a citizen of another state.

On Motion to Remand Cause to Common Pleas of McKean County.
Before BRADLEY, Justice, and McKENNAN, J.

BRADLEY, Justice. This is a feigned issue, granted at the instance of an assignee for the benefit of creditors of J. W. Humphrey and J. W. Humphrey & Co., to try the validity of a judgment recovered by Wright, the defendant in the issue, against the assignor, J. W. Humphrey. We have before us only the award of the feigned issue and the proceedings thereon and the docket entries relating thereto. The record of the proceedings under the assignment by virtue of which Fuller, as assignee, acquired a *status* in the case, and his petition for a feigned issue, have not been certified to this court. Without these proceedings we cannot see his authority to represent the creditors, and to apply for the feigned issue. Sufficient appears, however, by implication in the record before us to show that such previous proceedings were had; and if upon this hypothesis it appears that the defendant, Wright, would be entitled to remove the cause arising on the feigned issue, we should not be disposed to turn him out of court for a defective record, but would allow him to supply the defect by a supplemental return.

Looking at the case, then, as we suppose it to be, the question presented to us is whether it is one which, in its nature, is removable into the United States court. This is the only question before us at present. The objection as to the time of the application has been waived, inasmuch as the ground assigned for removal was local prejudice, on which a removal may be applied for at any time before the trial or final hearing of the suit. It is objected, however, that a feigned issue, in such a case as this, is not a distinct controversy of such a character as to be removable from the state to the federal court; but that it is a proceeding merely incidental to the principal proceeding under the assignment in the state court, instituted to inform the conscience of the court, and to enable it to administer the property of the insolvent assignors. But we are of opinion that this objection cannot be sustained. Creditors whose rights are infringed by a fraudulent judgment against their debtor have always had relief in the courts of Pennsylvania. Troub. & H. Pr. §§ 803-805. It is obtained in one of two ways: they may move to open the judgment and may be let in to make defense by showing the fact that it was

collusively obtained, or entered with intent to defraud them; or they may apply for a feigned issue for the purpose of determining the question of fraud or collusion. The latter proceeding is the more usual one, and is equivalent to a bill in equity to set aside a fraudulent judgment and to restrain its execution. It is, in effect, a regular suit in equity, involving a distinct controversy, which may well be removed to the United States court if a good ground for removal exists. The decision of the jury is binding and final, unless the verdict be set aside for irregularity, or reversed on writ of error. It is not like an issue framed by a court of equity for the purpose of informing the conscience of the court, which may be disregarded; but is more like the suit in equity itself, in which the decision has the force and effect of a judgment or decree as between the parties. The issue referred to in *Wible v. Wible*, 1 Grant, 406, was of the former kind, like an issue framed by a court of chancery, to inform the conscience of the court. There an issue had been framed by the orphans' court of Westmoreland county, in a case of partition, to determine whether the entire land had been given to one of the parties. This was held to be an issue to inform the conscience of the court, and the verdict was held to be not binding. The reason is not given, but is obvious. Partition could not be made unless the land was held in common, or jointly; and whether it was so or not was one of the questions to be determined by the orphans' court. If the court wished to have the advice of a jury on that point, it might frame an issue, and in such case the verdict would be, as the supreme court said, merely for the purpose of informing the conscience of the court, and would not be conclusive. But when creditors apply for and obtain an issue to determine whether a judgment against their debtors is or is not fraudulent as against them, it is a new and original proceeding instituted as of right, and the decision of the issue is binding upon the court; and the party in whose favor it is made has a vested interest in it, the same as in a judgment or decree.

These views are decisive of this case. Here the assignee, Fuller, the plaintiff in the feigned issue, represents creditors of Humphrey, the judgment debtor, who complain that the judgment recovered by Wright, the defendant in the feigned issue, was fraudulent as against them, or that it was part and parcel of the assignment for benefit of creditors, operating as a preference, and therefore void by the laws of Pennsylvania. The case, therefore, is precisely one of the kind referred to, in which creditors seek, by means of a feigned issue, to set aside a judgment fraudulent as against them.

The motion to remand the case is denied, and the defendant in the feigned issue is allowed to supply the defect in the record by filing an exemplification of the proceedings under the assignment, including the petition upon which the feigned issue was granted. No costs are allowed against the assignee on this motion.

HARTOG v. MEMORY.

(Circuit Court, N. D. Illinois. May 11, 1885.)

CIRCUIT COURT—JURISDICTION—ACT OF MARCH 3, 1875, CH. 137, § 5—DISMISSAL OF SUIT.

When, during the trial of a case in the circuit court, it appears from the testimony that the controversy in the suit is not one between a citizen of a state of the United States and a citizen of a foreign state, as alleged in the declaration, but one between two aliens, and no question arising under the constitution or laws of the United States is involved, a motion, after verdict, to dismiss for want of jurisdiction will be granted.

Motion to Dismiss.

Rosenthal & Pence, for plaintiff.

Austin Bierbower and *W. P. Black*, for defendant.

BUNN, J. This action was brought by the plaintiff, a citizen of Rotterdam, Holland, against the defendant, upon a contract for the delivery of pork, made at Rotterdam. In the declaration it is alleged that the defendant is a citizen of the state of Illinois. The defendant pleaded the general issue, and the case was tried, and a verdict rendered for the plaintiff for \$2,497. Upon the trial, the defendant, at the close of his testimony, testified that he had, for eight or ten years, resided, and been doing business, at Chicago; but was not a citizen of the United States, but was a citizen of Great Britain; from which testimony it appeared, for the first time to the court, near the close of the trial, that the controversy in the suit was not one between a citizen of a state of the United States and a citizen of a foreign state, but was one between two aliens, of which this court has no jurisdiction, under the laws and constitution of the United States. After verdict, the defendant moved to dismiss the suit for want of jurisdiction.

It seems clear to me, under the act of March 3, 1875, that the motion must prevail. Under the practice as it stood before the passage of that act, if the defendant did not plead specially to the want of jurisdiction, and there were proper allegations in the declaration showing the jurisdiction, or it otherwise appeared of record in the case, the defendant could not take advantage of any defect in the jurisdiction, appearing upon the trial or during the progress of the cause. The matter of jurisdiction, to a certain extent, was made a question of pleading. If the requisite diverse citizenship appeared of record, the defendant, if he wished to dispute it, must do so by special plea in abatement, the purpose of which rule was to keep the issue upon jurisdiction and the issue upon the merits separate and distinct. And the order of pleading was that pleas to the jurisdiction should be put in and tried first. And if there was a plea to the merits, the right to plead to the jurisdiction was waived, although the court might allow the defendant to withdraw his plea to the merits for the purpose of pleading to the jurisdiction. This was the natural and proper order of

pleading. But the result was that the court frequently found itself engaged in the hearing of controversies which it was never intended should be litigated in the federal courts, and over which it had in fact no jurisdiction under the constitution.

All that was necessary to bring about this state of things was to have a collusive understanding between the parties, whereby the question of diverse citizenship should not be raised. In that way, by putting the proper allegations into the record, which it was not necessary should be sworn to, and the defendant failing to plead to the jurisdiction, any controversy between two aliens, or between two citizens of the same state, might be litigated in the federal courts. The court, by its own rules and decisions, was powerless to remedy the evil, and it was not remedied until by the act of March 3, 1875. Section 5 of that act provides—

"That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require. * * *"

This provision wholly changes the rule that, in order to take advantage of the want of jurisdiction, the matter must be specially pleaded. It makes it the duty of the court at any stage of the proceedings to dismiss the case when this want appears. And this is as it should be. The court ought not to have its hands tied, and be required to hear and determine controversies over which the constitution gives it no jurisdiction, simply because one party has made false allegations of citizenship, and the other has failed purposely or otherwise to plead the facts within its own knowledge to show the want of jurisdiction.

But it is contended by plaintiff's counsel that the above provision applies only to two classes of cases, namely: *First*, where jurisdiction is sought to be maintained on account of the controversy being one arising under the constitution and laws of the United States; and, *second*, where the parties have been collusively made or joined for the purpose of creating a case cognizable under the act; and that it has no application to a case where the want of jurisdiction comes from the lack of the proper diverse citizenship of the parties, when that fact is relied upon; and that in this last case the old rule still holds that such want of citizenship must be pleaded specially, or the court cannot take notice of it. But such an interpretation seems too narrow, and I think is not warranted either from a consideration of the language employed or the mischief intended to be remedied. A very large majority of the cases, perhaps more than four-fifths of the cases

brought in the circuit courts of the United States, are cases at common law or in equity between citizens of different states or citizens of a state and aliens, and where the sole ground of jurisdiction is such diverse citizenship of the parties.

It would have been hardly expected that congress should have undertaken to provide for the small number of cases where jurisdiction comes from the fact that there is a controversy arising under the laws or constitution of the United States, and leave unprovided for that much larger class where jurisdiction comes from citizenship. Besides, there was no need to provide for the former class as it was always the rule in a suit between citizens of the same state claiming under grants from different states, or where the controversy was alleged to be one arising under the laws of the United States, that if it appeared upon the trial or hearing that the court had not jurisdiction of the subject-matter of the controversy, it should dismiss the cause.

In my judgment the first clause of section 5, "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," covers all classes of cases, whatever the claimed source, or ground of jurisdiction may be. It is said that this clause is only intended to apply to cases where the court gets jurisdiction by virtue of the subject-matter, and that these are only cases arising under the constitution or laws of the United States. But all questions of jurisdiction, as a ground of jurisdiction in the federal courts, are questions of jurisdiction of the subject-matter. The circuit court has not jurisdiction of the subject-matter of controversies at common law or in equity, unless the proper diverse citizenship exists. If it were merely a question of jurisdiction of the person, as in case of defective service, a general appearance would waive it. But it is well settled that neither a general appearance nor express consent can confer jurisdiction upon the circuit court of an ordinary controversy at common law or in equity between citizens of the same state. The parties must be citizens of different states, to give the court jurisdiction of the dispute or controversy. If, in the course of the proceedings, it shall appear that the case is one of which the court has not jurisdiction, as that it involves a dispute or controversy at common law between citizens of the same state, or between aliens, it becomes the duty of the court to dismiss the case. The cases of *Williams v. Nottawa*, 104 U. S. 209, and *Farmington v. Pillsbury*, 114 U. S. 138, S. C. 5 Sup. Ct. Rep. 807, arising under this section, were both cases where parties had been collusively made or joined; but the language and decisions of the court cover every case where it appears to the satisfaction of the court that it is one where it has no jurisdiction, and, in my judgment, should rule the case at bar. In the latter case, on page 144, the court, speaking by Chief Justice WAITE, say:

"The old rule, established by the decisions which required all objections to the citizenship of the parties, unless shown on the face of the record, to be

taken by plea in abatement, before pleading to the merits, was changed, and the courts were given full authority to protect themselves against the false pretenses of apparent parties. This is a statutory provision which ought not to be neglected. It was intended to promote the ends of justice, and is equivalent to an express enactment by congress that the circuit court shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, nor of suits in which parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the act."

See, also, *Rae v. Grand Trunk Ry. Co.* 14 FED. REP. 401, which was a case, like this, between two aliens, and *Ryan v. Young*, 9 Biss. 63, by Mr. Justice HARLAN. Both these cases, I think, are authority for the ruling here.

The case will be dismissed for want of jurisdiction.

BOSTON ELECTRIC CO. v. ELECTRIC GAS LIGHTING CO.

SAME v. NEW ENGLAND ELECTRIC MANUF'G CO.

(Circuit Court, D. Massachusetts. May 20, 1885.)

JURISDICTION OF CIRCUIT COURT—FOREIGN CORPORATIONS—ATTACHMENT—PUB. ST. MASS. CH. 105, § 28.

Defendant corporations, organized under the laws of Maine, but having their principal place of business in Massachusetts, where a majority of their officers and directors resided, were sued in the circuit court for the district of Massachusetts; the writs being served by attachment of corporate property within the latter state, and by service on the corporate officers. *Held*, on pleas to the jurisdiction, that the court had no jurisdiction.

Plea to Jurisdiction.

J. E. Abbott, for plaintiffs.

E. P. Payson and *A. Eastman*, for defendants.

COLT, J. The defendants' pleas, in both these cases, raise a question of jurisdiction. The defendant corporations, organized under the laws of Maine, have been sued in the circuit court for the district of Massachusetts. The writs were served by attachments of corporate property within this state, and by service upon the proper officers here, if such service could be legally made. It is agreed that the defendant corporations have a usual and principal place of business in Boston; that the president, treasurer, and a majority of the directors of each corporation reside in the state; and that the infringements for which these actions are brought were committed here.

The act of 1875, (18 St. 470,) following the eleventh section of the judiciary act of 1789, provides that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, or shall be found at the time of serving the writ. Courts

of the United States cannot acquire jurisdiction by an attachment of property merely, but there must be a personal service of the writ or process upon the defendant, or a voluntary appearance. *Pennoyer v. Neff*, 95 U. S. 714; *Ex parte Railway Co.* 103 U. S. 794; *Nazro v. Cragin*, 3 Dill. 474; *Parsons v. Howard*, 2 Woods, 1; *Anderson v. Shaffer*, 10 FED. REP. 266; *Mohr & Mohr Distilling Co. v. Insurance Co.* 12 FED. REP. 474; *Saddler v. Hudson*, 2 Curt. 7. It is evident, therefore, that the court could not acquire jurisdiction simply by the attachment of the property of the defendant corporations under the provisions of the Massachusetts statute. Pub. St. c. 105, § 28.

The general rule is that a corporation cannot migrate beyond the state by whose laws it is created. *Day v. India Rubber Co.* 1 Blatchf. 628. But this rule has been modified, and it is now held that a corporation may be found in a foreign state, within the meaning of the federal law, when it exercises its powers by express consent of the legislature of such state, (*Railroad Co. v. Harris*, 12 Wall. 65;) or when it is required by a general law of the state to appoint an agent for the service of process, as a condition to the transaction of business within the state, (*Lafayette Ins. Co. v. French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369;) or when, under a general law of the state, foreign corporations are made liable to suit without the appointment of an agent for that particular purpose. *Williams v. Empire Transp. Co.* 14 O. G. 523; *Wilson Packing Co. v. Hunter*, 7 Reporter, 455; *St. Clair v. Cox*, 106 U. S. 350; S. C. 1 Sup. Ct. Rep. 354.

A corporation of one state cannot do business in another state without the latter's consent, express or implied; and that consent may be accompanied with such conditions as it may think proper to impose. *St. Clair v. Cox*, *supra*. When the state, by local law, provides that foreign corporations doing business in the state shall be amenable to suit, such foreign corporations thereafter carrying on business in the state are liable to suit. But clearly, by the great weight of authority, this rule has not been extended so as to permit a corporation to be sued in a foreign state because it carries on business there, in the absence of a state law authorizing such suit. The supreme court say, in *Lafayette Ins. Co. v. French*:

"We limit our decision to the case of a corporation acting in a state foreign to its existence under a law of that state, which recognized its existence for the purposes of making contracts, and being sued on them through notice to its contracting agents."

In *Railroad Co. v. Harris*, the court said:

"It [the corporation] cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented."

Chief Justice WARRE thus defines the rule in *Railroad Co. v. Koontz*, 104 U. S. 5:

"It is well settled that a corporation of one state doing business in another is suable where its business is done, if the laws make provision to that effect."

Perhaps the latest expression of the supreme court on this subject is in *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138, S. C. 4 Sup. Ct. Rep. 364, where Mr. Justice BLATCHFORD says:

"In the courts of the United States, it is held that a corporation of one state, doing business in another, is suable in the courts of the United States established in the latter state, if the laws of that state so provide, and in the manner provided by those laws."

See, also, *Eaton v. St. Louis Shakspear Min. & S. Co.* 7 FED. REP. 139; *West v. Home Ins. Co.* 18 FED. REP. 622. At the time these suits were brought, Massachusetts had no local law making foreign corporations doing business in the state amenable to suits, except foreign insurance companies, and except the provisions in relation to attachment, which, under a well-settled rule, could not give this court jurisdiction. Recently, however, feeling the necessity for such a law, a statute has been passed requiring all foreign corporations doing business in the state to appoint an agent, upon whom service can be made. Acts 1884, c. 330.

The plaintiffs rely upon the case of *Hayden v. Androscoggin Mills*, 1 FED. REP. 93. A similar question of jurisdiction there arose on a motion to dismiss, and the decision was based primarily on the impropriety of the motion. Judge LOWELL, however, goes on to discuss the merits of the question, and while he intimates, at the close, that if the question was brought up in some new form, his decision might be different, yet he gives it as his opinion that a foreign trading corporation doing business in the state of Massachusetts may be sued in the circuit court, by summons duly served upon an officer of the company, the fact of attachment being immaterial. We cannot adopt this view in the light of what we believe to be the great weight of authority on this question. The pleas to the jurisdiction of the court are sustained.

NORTON, Chief Supervisor, v. BREWSTER, State Supervisor of Registration.¹

(Circuit Court, E. D. Louisiana. November 1, 1884.)

1. FEDERAL ELECTIONS—JURISDICTION.

The jurisdiction of the United States courts must appear of record, and be derived from congressional enactments.

2. SAME—REV. ST. TIT. 26.

Under title 26 of the Revised Statutes of the United States the circuit court is given jurisdiction at certain elections to appoint supervisors to scrutinize the election, and under title 70, Crimes, to try criminal violations of the laws

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

of the United States relating to the elections of members of congress, but it nowhere appears that congress has adopted the election and registration laws of any state.

On twenty-seventh October, 1884, the plaintiffs presented to the court a petition, in which they represent themselves to be the chief supervisor of elections for this district, appointed by this court under title 26 of the Revised Statutes of the United States; several of the ward supervisors of election in the city of New Orleans, appointed at the request of the Democratic party; and a number of canvassers appointed by the Democratic party,—for that part of the parish of Orleans within the First congressional district of the state of Louisiana. They allege that a general election is pending, and to take place on fourth November, 1884, for the offices of president and vice-president of the United States, and for members of congress, under the laws of the United States and of the state of Louisiana; that part of the city of New Orleans is in said First congressional district by the laws of Louisiana; that the federal government, through its proper officers, has all of the right of control, inspection, and direction set forth in title 26 of the Revised Statutes of the United States; that under said statutes the law relating to the registration of the voters of Louisiana became and is a part of the law of the United States relating to the registration of voters for said election; that the act No. 123 of the legislature of Louisiana, of 1880, is the said registration law, which provides for the appointment of a supervisor of election for the parish of Orleans, (the parish of Orleans and city of New Orleans have the same geographical boundaries,) and defines his duties, among which he is required to register such persons as are entitled to vote, and to expunge from the list of registered voters all persons who have been committed to prisons as convicts, who have died subsequent to registration, who have departed the state or district, or who have become insane; that he is also required, upon the affidavit of any two *bona fide* citizens who have been appointed by any political party and have been duly sworn to perform their duty as canvassers, and who present to him an affidavit that certain names are fraudulently and illegally registered and should be erased, to investigate the same, and after due proceedings, cause said names to be erased from the registration; that said act further provides that, in case of the failure of the supervisor to so investigate and erase, an appeal may be made to any court of competent jurisdiction, to be tried in the most summary way, etc.; that the circuit court of the United States for the Eastern district of Louisiana, now sitting in special session, is the only court of competent jurisdiction in session within said First congressional district; that Robert Brewster is now the supervisor under the said act, and that the plaintiffs have, under oath, as such officers and canvassers as aforesaid, caused to be made an exact canvass of all that part of the city of New Orleans within the First congressional district, and all the inhabitants thereof, and have ascertained that all of the persons named in the lists herewith presented and filed are contained and exist

upon the books of registration in said parish of Orleans wrongfully and fraudulently, and that said persons have no right to vote; and that these plaintiffs have caused the said lists of names, with the requisite affidavits concerning each name made and sworn to by two officers, and have in all things done every act and given every notice and proof required by law to compel said Brewster to strike said names from the books and lists of registration, but said Brewster refuses to take any steps or proceedings to erase said names, and will, in no manner, investigate the truth of the matter so presented to him; wherefore plaintiffs pray that said Brewster be ordered to show cause why he should not erase the said names from the books of registration.

The court granted a motion on the same day ordering Robert Brewster to show cause, on thirty-first October, 1884, why the relief prayed for should not be granted. On the thirty-first October, 1884, the cause was heard, defendant having filed an exception, on the grounds (1) that the court had no jurisdiction in the premises, as there is no delegation of authority by congressional enactment; (2) that the court had no jurisdiction to proceed by rule, or in a summary manner; (3) that the proceeding discloses no cause of action.

James R. Beckwith, for plaintiffs.

M. J. Cunningham, Atty. Gen., *James B. Eustis* and *L. O'Donnell*, for defendants.

PARDEE, J. The jurisdiction of this court must appear of record, and be derived from congressional enactments. There is no statute conferring jurisdiction in a matter or controversy of the kind now before me. Under title 26, Rev. St., relating to the elective franchise, the circuit court is given jurisdiction in certain elections to appoint supervisors to scrutinize the election. Under the title of "Crimes" the circuit court is given jurisdiction to try criminal violations of the laws of the United States relating to the elections of members of congress. Further than as given by these two titles, the circuit court has no jurisdiction in the matter of elections.

A plausible argument in favor of the jurisdiction might perhaps be made if congress had adopted the state statutes in relation to elections, and then a controversy involving over \$500 as to private rights appeared, arising under the state law, and inferentially under the laws of the United States. In such a case the act of March 3, 1875, giving original jurisdiction to the circuit courts of the United States of all suits of a civil nature at common law or in equity where the matter in dispute exceeds the sum or value of \$500, and arising under the constitution or laws of the United States, etc., might, perhaps, be successfully invoked. But we have no such case here; for it nowhere appears that congress has adopted the election and registration laws of any state, and in the present case no sum or value is suggested.

It is clear that the court is without jurisdiction, and the petition for relief is therefore refused and dismissed.

THE LIBERTY BELL.¹BAYLE and others v. CITY OF NEW ORLEANS.¹*(Circuit Court, E. D. Louisiana. June 4, 1885.)*

1. MUNICIPAL LAW—MISAPPROPRIATION OF FUNDS.

An ordinance making an appropriation of the funds of a city, derived from taxation, for purposes wholly beyond the purview of municipal government, is a wrongful appropriation of the funds held in trust for the tax-payers and people to pay the alimony and legitimate expenses of the city, and is, in short, *ultra vires*, illegal, null, and void.

2. JURISDICTION—INJUNCTION.

Resident tax-payers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of a municipal corporation or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay. *Crompton v. Zabriskie*, 101 U. S. 609.

In Chancery. Rule for an injunction.

Edgar H. Farrar, E. B. Kouttschnitt, Charles B. Singleton, Richard H. Browne, Benj. F. Choate, Edward D. White, Eugene D. Saunders, John H. Kennard, W. W. Howe, S. S. Prentiss, and Charles E. Schmidt, for complainants.

Walter H. Rogers, City Atty., for defendants.

PARDEE, J. An injunction, *pendente lite*, is asked on the following bill:

"Joseph Bayle, a resident of the city of New Orleans and state of Louisiana, and a citizen of the French Republic, brings this bill of complaint against the city of New Orleans, a municipal corporation organized under the laws of the state of Louisiana, and as such a resident of said state, and against Isaac W. Patton, treasurer, and John N. Hardy, comptroller, of the city of New Orleans, both citizens of the state of Louisiana, and residing in this district.

"And thereupon your orator complains and says: That your orator is a resident tax-payer of the city of New Orleans, who pays annually into the city treasury municipal taxes exceeding \$500 in amount; that some time in the year 1884, the city of Philadelphia was applied to by the World's Industrial and Cotton Centennial Exposition to allow a certain bell, well known as the 'Liberty Bell,' to be sent to New Orleans and put upon exhibition on the grounds of the said exposition company; that the said bell was transmitted to New Orleans by the city of Philadelphia, and placed upon exhibition in the exposition grounds, with some agreement or understanding that the said bell should be considered as in the custody of the corporation of the city of New Orleans, and that it should be returned to the city of Philadelphia at the close of the exposition, on or about the thirty-first of May, 1885; and that said bell was, as your orator is informed and believes, and so charges, brought to the city of New Orleans by rail, and without charge, and that the committee or persons in charge of said bell were also brought to the city of New Orleans free of transportation expenses.

"Your orator is informed and believes, and so charges, that any of the rail-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

roads leading out of the city of New Orleans are now willing and anxious to haul the said bell back to Philadelphia free of charge, and also to transport to and from Philadelphia such reasonable committee of persons as may be appointed to take charge of it; that the council of the city of New Orleans have organized a junketing expedition to go to Philadelphia, ostensibly in charge of the said bell, and did, on the twenty-seventh day of April, 1885, by ordinance No. 1,214, council series, make an appropriation of \$5,000 out of the public treasury of the city of New Orleans, stating that the same was for the purpose of defraying all expenses which might accrue by the return of the liberty bell from the exposition grounds to the city of Philadelphia at the close of the exposition, and directing by the said ordinance that the comptroller should warrant upon the treasurer whenever there were funds in the treasury to pay this appropriation.

"Now, your orator avers that this appropriation under ordinance 1,214 is absolutely null, void, and of no effect or validity; that the removal of the said liberty bell, and the contract, agreements, and understandings with reference thereto are beyond the corporate authority of the city of New Orleans, and that the city council has no power to expend any money for any of the purposes mentioned in said ordinance No. 1,214.

"Further complaining, your orator avers that he is informed and believes and so charges, that the said city of New Orleans, through some of its officials, have agreed with the Northeastern Railroad Company to take the said bell back to Philadelphia free of cost of transportation, and that the said Northeastern Railroad Company has agreed to give free passes to a sufficient number of persons as a committee in charge of said bell; the same not being, from any point of view, legitimate municipal expenditures within the power of the city of New Orleans; that your orator, in company with all other taxpayers of the city of New Orleans, will receive irreparable injury and damage from this unlawful appropriation of public money, and that they are entitled to the protection of a court of equity to enjoin and restrain this void act, as they and your orator are entirely without remedy in a court of law."

The allegations of fact in the bill are substantially shown by affidavit and are not denied. The counter-affidavits show that the board of two policemen of Philadelphia, in charge of the liberty bell, has been paid for the last two months by the city, and that the city has paid for the symbolical decoration of said bell, which expenses are expected to be met by the appropriation under the said ordinance. There is no doubt that the said ordinance makes an appropriation of the funds of the city of New Orleans derived from taxation for purposes wholly beyond the purview of municipal government; is a wrongful appropriation of the funds held in trust for the tax-payers and people of New Orleans to pay the alimony and legitimate expenses of the city; and is, in short, *ultra vires*, illegal, null, and void. See acts La. 1882, No. 20, pp. 20, 21, §§ 7, 8; 1 Dill. Corp. § 52 *et seq.*; *Hood v. Lynn*, 1 Allen, 103; *Tash v. Adams*, 10 Cush. 252; *Clafin v. Hopkinton*, 4 Gray, 502; *Murphy v. Jacksonville*, 18 Fla. 318; *Grant Co. v. Bradford*, 72 Ind. 455; *Henderson v. Covington*, 14 Bush, 312; *Cornell v. Guilford*, 1 Denio, 510; *Hodges v. Buffalo*, 2 Denio, 110; *Halstead v. Mayor, etc., of New York*, 3 N. Y. 433; *New London v. Brainard*, 22 Conn. 552.

The principle that a municipal corporation can have no other power than those derived from constitutional or legislative grants, expressly

or by necessary implication, is well settled in Louisiana, and is settled for the city of New Orleans in *Guillotte v. New Orleans*, 12 La. Ann. 432.

The illegality and nullity of the ordinance being clear, the question remaining for decision is as to the jurisdiction and propriety of an injunction in this particular case. "In this country, the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers, or violating their legal duties, in any mode which will injuriously affect the tax-payers,—such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property, under circumstances presently to be explained,—has been affirmed or recognized in numerous cases in many of the states. It is the prevailing doctrine on this subject." Dill. Mun. Corp. § 731.

In *New London v. Brainard*, 22 Conn. 552, which was a case of injunction to restrain appropriation to celebrate the fourth of July, the supreme court of Connecticut, in holding that a citizen and taxpayer is entitled to an injunction to restrain an illegal appropriation of the money of the city, said, in substance, that it is so because the city corporation holds its moneys for the corporators, to be expended for legitimate corporate purposes; and a misappropriation of these funds is an injury to the tax-payer, for which no other remedy is so effectual or appropriate. See Dill. § 732 *et seq.*, for the many cases sustaining this doctrine.

And in *Crampton v. Zabriskie*, the supreme court of the United States seem to indorse fully the position of Dillon, for that court says:

"Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of a county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity for prompt action to prevent irremediable injuries, it would seem eminently proper for the courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporation." *Crampton v. Zabriskie*, 101 U. S. 609.

There being no doubt as to the illegality of the ordinance and the appropriation, and no reasonable doubt as to the appropriateness of

the remedy sought, nor as to the jurisdiction of the court, the patriotic phase of the case is not potent enough to affect the action of the court. If, in Massachusetts, Connecticut, New York, Virginia, and other states, municipal corporations are not permitted to encourage and disseminate patriotism and the love of liberty by celebrations, at municipal expense, of the fourth of July, the surrender of Cornwallis, and other stirring epochs in the history of the country, there would seem to be no reason why this court should hold its hand, and not prevent the city of New Orleans, at the expense of her tax-payers, from advertising the patriotism of her mayor, council, and citizens by appropriate ceremonies and enthusiasm and decoration, in the return of the famous and honored liberty bell to the city of Philadelphia.

As was aptly suggested by counsel in argument, municipal corporations *per se* exhibit the highest patriotism in obeying the laws made for their government.

Under the circumstances and law of this case it seems the plain duty of the court to grant the injunction as prayed for; and it is so ordered.

CENTRAL TRUST CO. *v.* TEXAS & ST. L. RY. CO.¹

(Circuit Court, E. D. Missouri. June 1, 1885.)

1. EQUITY PRACTICE—DELAY IN FILING ANSWER.

A foreclosure suit having been instituted against a railroad company upon a mortgage given to secure its bonds, the company appeared and consented to the appointment of a receiver, and assented to all steps thereafter taken in the case without filing any answer for about a year and a half, and then asked leave to file an answer. *Held*, that if the defendant had a meritorious defense, an answer stating it, under oath, might be submitted, provided it was shown to the satisfaction of the court by explanatory affidavits that there was a good excuse for the delay.

2. MORTGAGE—DEFAULT IN PAYMENT OF INTEREST—CLAUSE AS TO PRINCIPAL—FORECLOSURE.

Seemle, that where a mortgage is given by a railroad company to secure the payment of bonds and interest coupons thereto attached, the trustee may institute foreclosure proceedings immediately upon default in the payment of interest, and that the right so to do is not affected where the mortgage provides that in case the mortgagor "fail to pay the interest on any of the said bonds at any time when the same may become due and payable according to the tenor thereof, and shall continue in default for six months after such payment has been demanded, * * * then and thereupon the principal of all the bonds hereby secured shall become immediately due and payable, provided, etc.; and that in such case * * * the trustee * * * may take, with or without entry or foreclosure, actual possession of said road;" and fails to provide expressly for immediate foreclosure upon such default.

In Equity. Foreclosure suit. Motion for leave to file an answer. A receiver was appointed in this case, with the consent of the de-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

fendant, January 12, 1884, and all succeeding steps in the case have been taken without any opposition on the defendant's part. No answer has been filed, nor was leave to file answer asked, until May 4, 1885, when the defendant, by its attorney, asked leave to file an answer, claiming that this suit was not instituted by the trustee for the purpose of carrying out and executing the conditions of the mortgage in good faith, but to promote a certain scheme, which parties holding 51 per cent. of the company's bonds had entered into, to foreclose the mortgage for the purpose of depriving a minority of their rights in the company, and that the knowledge of this scheme had not reached the defendant until April 25, 1885. The defendant claimed in the argument, moreover, that the complainant had no right to foreclose until six months after default in the payment of interest, and that the suit had been instituted before that period had elapsed. The mortgage contains the following among other clauses, viz.:

"That so long as the party of the first part, or its successors or assigns, shall well and truly perform all and singular the stipulations of the said bonds and coupons and the covenants of this indenture, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess and enjoy the said mortgaged premises," etc. * * *

"That in case the party of the first part, its successors or assigns, shall fail to pay the interest on any of the said bonds, at any time when the same may become due and payable, according to the tenor thereof, and shall continue in such default for six months after such payment has been demanded at its or their agency, in the city of St. Louis or New York, then and thereupon the principal of all the bonds hereby secured, shall be and become immediately due and payable: provided, the said trustee gives written notice to the party of the first part, its successors or assigns, of its option to that effect while such default continues; which notice it may give of its own motion, but shall be bound to give, if required, in writing, to do so by the holders of fifty per centum of said bonds then outstanding; and that in such case * * * the said trustee, or its successors in this trust, may, in its discretion, and shall upon the request in writing, of the holder of fifty per centum of said bonds then outstanding, etc., take, with or without entry or foreclosure, actual possession of said road."

"Nothing herein contained shall be construed as limiting the right of the said trustee to apply to the courts for judgment or decree of foreclosure and sale under this indenture."

Elencious Smith, for complainant.

Jeff. Chandler and Dyer, Lee & Ellis, for defendant.

TREAT, J., (*orally*.) There is an application to the court for leave to file an answer in the case of the Central Trust Company against the Texas & St. Louis Railway Company. I have noted the points to be considered in the case. The first order in this case was made by Judge McCrary, and recited the express consent of the defendant. This application now before the court is by the defendant itself, which seeks, after this lapse of time, to be permitted to come in to dispute what it expressly assented to and agreed should be recited in the original decree. The question of laches is apparent. No answer was filed within the time prescribed, and now this effort is made

so to do. In the mean while this court, under the consent of all the parties, through its receiver, has been administering this property. The thought, in the proposed answer suggested, is that there was no right on the part of the plaintiff in this case to proceed for default of interest until the expiration of six months after the default first occurred. The court does not so read the mortgages. The party plaintiff had the power to proceed for default of interest in September, when the default occurred. The provisions of the mortgage are that if said default continues for six months, the trustee may declare the principal due; and if he does not at his own discretion so do, a majority of the bondholders may compel him so to do. Therefore the six months' clause in the mortgage has nothing to do with the default of interest, on which the right of the trustee to proceed is based. It merely relates to the making of the principal also due. That is but one of the allegations. In the original bill there is a second allegation which is of the same nature as this court has been acting upon in the *Wabash Case*, to-wit, that this company, with the consent of all concerned, had stated that its condition was such that, without the aid of the court, all parties in interest would be seriously damaged. Hence there are two grounds to the bill: (1) The default in the September interest; (2) the wrecked condition of the road.

Experience has shown, in the course of this administration, that the second allegation, unfortunately, is too true; for this court has been occupied for a long period of time in trying to save the rights of the parties by issuing receivers' certificates in some instances, and by controlling the property generally, which was in the most unfortunate condition when the court took possession of it. And it is one of the few cases, so far as my experience goes, in which a receiver has been enabled to rescue a property that was comparatively worthless at the time he took charge of it. Now, if the defendant were a natural instead of an artificial person, evidently he would be estopped. It has not only expressly consented to all that has been done, but a great deal that has been done, has been done at its instance. It waits for this great length of time, and then, by reason of some outside wrangle between parties, it seeks to upset the whole action of the court, and all that it itself has caused to be done, or that has been done at its express request and instance.

But it is stated in the argument that a minority of the bondholders and of the stockholders, to-wit, 10 per cent., did not enter into that corporate action; to which the ready reply is, "Why, then, have they waited all this length of time, knowing all these facts?" They have their rights, though in a minority interest, to make their application to the court in due time to prevent any wrong being done to them, if any was contemplated. It must be remarked that the plaintiff in this case is a trustee under two mortgages: the first and the second. It therefore became it, as such trustee, to take such action as would preserve the interests, not of the bondholders under the first

mortgage alone, but of all. It has so attempted to do. The result is, in order that the party may become of record, and have his alleged right adjudicated formally, instead of having in the exercise of discretion his right to become of record refused, that leave will be granted to him to submit an answer under oath, with explanatory affidavits, showing why this long delay while this course of proceeding has been going on. That answer will have to be presented within 10 days; and if allowed to be filed, the plaintiff will have leave to file a replication forthwith, so that this proceeding shall not be indefinitely prolonged in this court. If defendant has any meritorious defense, it can present it within that time. That answer, however, will have to be submitted to the court in order that the court may see whether it is confined to the real issues of the case, instead of being filled with immaterial issues, as the proposed answer is. The court has nothing to determine but the real controversy here, and the wranglings among outside parties are utterly immaterial to the question whether this mortgage shall be foreclosed and the property sold. Of course, when the order of foreclosure is made, if it ever shall be, the court will take care that the minority are as thoroughly protected as the majority; but in this stage of the controversy, where only the rights of the parties are to be determined in reference to the foreclosure, the court has nothing to do with that incidental question. Therefore the application as now made, that is, the answer submitted to the court, is denied; but leave is given on the terms expressed to submit a proper answer under oath, with affidavits showing why these parties have for some 15 months or more lain by and assented to everything, and now come in and wish to go back on their own express assents before the court.

SIMMONS, Successor, etc., v. TAYLOR, Successor, etc., and others.
(Cross-Bill.)¹

(Circuit Court, S. D. Iowa, C. D. May 12, 1885.)

1. RAILROAD MORTGAGES—FORECLOSURE PROCEEDING—EQUIPMENT AND INCOME MORTGAGE—BURLINGTON, CEDAR RAPIDS & MINNESOTA RAILROAD COMPANY.

On examination of the proceedings heretofore had in this case, *held*, that the second, or income and equipment, mortgage was not foreclosed, and the rights of the holders of bonds secured thereby cut off by the decrees and sales, and that the bondholders were not estopped from asserting their rights under such second mortgage.

2. SAME—ESTOPPEL.

A party is not estopped for remaining silent or inactive when he is under no obligation, legal or moral, to speak or act.

In Equity.

Prior to 1875 the Burlington, Cedar Rapids & Minnesota Railroad Company had constructed a main line and three branches, the latter known, respectively, as the Milwaukee Division, the Muscatine Divis-

¹ See 3 Sup. Ct. Rep. 58, *Sub nom* Burlington, C. R. & N. Ry. Co. v. Simmons.

ion, and the Pacific Division. Upon the main line and upon each of its branches, separately, it had placed a first mortgage. The trustee in the mortgage on the Pacific branch was the Farmers' Loan & Trust Company. All these mortgages were executed prior to the first of June, 1874. On that day it executed to said Farmers' Loan & Trust Company, as trustee, a second mortgage covering the road and all its branches, and given to secure what it denominated income, equipment, and convertible bonds. This mortgage purported to be a first lien upon the entire net income, upon 130 box cars, being those numbered by all even numbers from 882 to 1,140, and upon engines numbered 30 and 31, as well as a second lien upon all the property covered by the various first mortgages herein before referred to.

Defaulting in the payment of interest on these several mortgages, on the fifteenth of May, 1875, a bill of foreclosure of the first mortgage on the main line was filed in the circuit court of the United States for the district of Iowa. At first the only party defendant was the Burlington, Cedar Rapids & Minnesota Railway Company, but on July 5, 1875, by amendment, the Farmers' Loan & Trust Company, trustee in the second, the income and equipment, mortgage was also made a party defendant. A demurrer to this bill was filed by the defendants. Similar bills of foreclosure were filed to foreclose the mortgages on the several divisions. In that to foreclose the mortgage on the Pacific Division the Farmers' Loan & Trust Company, trustee, set up not merely its first mortgage on that division, but its income and equipment mortgage, or second mortgage, upon all the divisions.

Matters stood in this condition until the thirtieth day of October, 1875. On that day decrees were entered. In the Pacific Division case, the decree, after finding the amount due on the bonds and coupons secured by the first mortgage to the Farmers' Loan & Trust Company, ordered the payment of that amount within 10 days by the railway company to the mortgagee, and in default thereof that the property described in and conveyed by said mortgage be sold by a special master, "appointed to execute this decree, and make such sale as herein directed to satisfy said bonds, coupons, costs, fees, and expenses of this suit remaining unpaid," and that, after approval of the sale, the master executed a deed to the purchaser, and also awarded a general execution against the railway company for any deficiency which might exist after such sale. The only reference in the decree to the income and equipment mortgage is found in these words:

"That portion of complainant's bill relating to the income and equipment mortgage, so called, is ordered to be consolidated with the causes pending in this court against some respondents, wherein said Frost, Taylor, and others are, respectively, complainants."

The three other first mortgage cases were consolidated and one general decree entered. That decree contains the order of consolida-

tion; then, after reciting that the defendant, the railway company, withdraws its demurrers, pleas, etc., and urges nothing in bar of the relief sought by the several complainants, goes on to find the amounts due upon said three first mortgages, directs the payment of such several amounts by the railway company within 10 days; "or, in default thereof, that *its* equity of redemption is barred," and, in further default thereof, orders sale of the respective properties mortgaged. It provides for a report of the sales, confirmation, and deeds by the master. In reference to the Farmers' Loan & Trust Company, and its income and equipment mortgage, and after the order made in respect to each first mortgage, appears this language:

"And this decree is made subject to the rights of any intervening creditors now before this court. And the claim of the Farmers' Loan & Trust Company on the income and equipment mortgage to any of the cars or machinery named in the same is to be submitted to this court in term time, or vacation, as soon as counsel can agree on the facts in relation thereto. Any dispute among the holders of the four mortgages foreclosed, including the Pacific Division, as to cars and machinery, if not settled by themselves, is to be determined by the court at the next term. And the receiver now in possession is required to operate and preserve said property for the benefit of the bondholders seeking to foreclose this mortgage; and he is required to make a report, and adjust his accounts of receipts, expenditures, and contracts made by him up to the date of said sale; and any residue in his hands is to be paid to the master and credited to the mortgage debt up to that date; and if said property shall not sell for sufficient to pay said debt, interest, and costs, the said plaintiff may have a general execution for the residue against the said Burlington, Cedar Rapids & Minnesota Railway Company."

And at the close of the decree is this general reservation:

"The court reserves the power to make further orders and directions; and no sale under this decree is to be binding until reported to the court for its approval."

This is the entire reference made in this decree to this income and equipment mortgage and to the claim of the Farmers' Loan & Trust Company, and the only language therein which can bear upon or affect the questions to be hereafter considered.

In this consolidated case, on the day of the decree, October 30, 1875, there was filed an answer and cross-bill by the Farmers' Loan & Trust Company, and on November 22, 1875, the complainants filed a replication to such answer, and an answer to such cross-bill. In these pleadings of the Farmers' Loan & Trust Company, the execution of the second mortgage above referred to is set forth, and it is alleged that \$1,200 of the bonds secured thereby have been sold and disposed of, that the interest thereon has not been paid, and that the entire sum, principal and interest, is declared to be due. It does not appear that there was ever any agreement of counsel, any submission to the court, or any action taken by the court as to the specific matter reserved in the decree in the consolidated cases as to the claim of the Farmers' Loan & Trust Company to cars or machinery. Nor

was there any order or decree ever entered upon the cross-bill, and the answer thereto, or any action appearing of record taken by the court in respect to these later pleadings, or the issues presented by them.

In pursuance of those decrees in the summer of 1876, the masters, after due advertisement, sold the main line and the several branches to a committee of the bondholders. Those sales were reported to the court with a proposed plan of reorganization, which sales were confirmed and deeds made in pursuance thereof. The proposed plan of reorganization contemplated a distribution of the stock and the bonds of a new company, to be known as the "Burlington, Cedar Rapids & Northern Railway Company," according to certain specified proportions, to the holders of the first mortgage bonds on the main line and several divisions. No reference was made in this plan to the income and equipment mortgage, or the bonds secured thereby. All of that matter was simply ignored. The sales having been confirmed and the deeds passed, the reorganization was perfected, the stock and bonds issued, distributed according to the proposed plan, and put upon the market for sale. This was in the year 1876. It further appears that most, if not all, the holders of these income and equipment bonds, secured by the second mortgage, were owners and holders of first mortgage bonds, and participated in the reorganization to the extent of surrendering such first mortgage bonds and taking bonds in the new company. The trustee in the mortgage issued by the new company was the Farmers' Loan & Trust Company, the trustee in this income and equipment mortgage. It accepted the trust conferred by this new mortgage, and took no further action in reference to the income and equipment mortgage, or in enforcing the rights, if any there were remaining to the holders of the bonds secured thereby.

Matters remained in this condition until April, 1883, when certain holders of those bonds presented in this court a petition for the appointment of Charles E. Simmons as trustee in said mortgage, in place of the Farmers' Loan & Trust Company, which petition was granted, and thereupon the said trustee filed his amended cross-bill setting forth the various proceedings heretofore stated, and praying for the finding of the amount due upon the income and equipment mortgage, and the redemption of the property from said master's sales. It further appears that all of said income and equipment mortgage bonds, or at least nearly all, were issued to the various holders thereof simply as collateral security for debts owing by the mortgagor company.

Hubbard & Clark, for complainants in cross-bill.

Ransom, Bral & Withrow, for defendants in cross-bill.

BREWER, J. The first question is whether this second mortgage, this income and equipment mortgage, was foreclosed, and the rights of the holders of bonds secured thereby, cut off by the decrees and sales. Obviously not. In the Pacific Division mortgage case, the

claim of the second mortgage was, by the term of the decree, transferred to the consolidated cases. While the Farmers' Loan & Trust Company was the trustee in both the second mortgage and the first mortgage on the Pacific Division, yet, so far as that decree is concerned, it stands as though there were not only two separate mortgages, but two separate trustees. The first mortgage was foreclosed; the second mortgage, and all claims thereunder, transferred to another case. There was no decree barring the claim of the second mortgagee; there was no finding of the amount due on such second mortgage; there was no order of sale to satisfy said mortgage. In brief, the only reference to such second mortgage was the transfer of it, and all claims thereunder, to another suit. Upon what, then, can it be pretended that so far as this income and equipment mortgage was a second lien upon the Pacific Division, it was foreclosed, and the rights of the holders of the bonds secured thereby cut off by this decree?

Turning now to the decree in the consolidated cases, there affirmatively appears a waiver by the railroad company, the mortgagor, of all defenses, and a decree barring its equity of redemption in default of the payment of the mortgaged sum within 10 days after the decree, a finding of the amount due under these three first mortgages, an order requiring the payment of such sums within 10 days, and an order for a general execution for any balance of such sums not realized upon the sales ordered; in short, everything to show a foreclosure of those prior mortgages, and an omission of all of those matters in respect to this second mortgage. There is no finding of the amount due under this second mortgage; no order that the mortgagor pay any such amount; no order for an execution for any balance of such amount not realized upon sale; no order barring the second mortgage of its equities in the matter; no decree of foreclosure against it; in fact, no other reference to this second mortgage than in the simple reservation for future determination by the court of so much of its claim as asserted a first lien upon certain specific personal property. Now, at the time of this decree there was pending before the court an answer and cross-bill of this second mortgagee by which all its rights were presented. The decree ignores them except as to a little matter of alleged priority in respect to some personal property. Did the parties understand that this second mortgage was foreclosed, that the rights of such second mortgagee were cut off by this decree? Obviously not. Beyond the silence of the decree itself is the fact that within a month the complainants filed answer to its cross-bill and replication to its answer. Obviously they understood that there was pending for adjudication the claim of a second mortgage.

Counsel in this case has argued strongly that there is such a difference between the old proceedings for strict foreclosure and the ordinary proceedings of to-day for foreclosure by sale that a sale cuts off all rights of every party to the suit. That proposition is too broad.

I agree that every right presented and adjudicated for or against any mortgagee or mortgagor is determined by the decree, but I cannot agree that a right presented by bill or cross-bill and unnoticed in the decree, and not absolutely necessary for determination in the decree, is determined by the simple fact that the party presenting it is in court. The rights of the various parties to a foreclosure suit are determined by the nature of the decree entered. And nothing is determined which is not expressly determined, or which is not impliedly settled by the terms of the decree in fact entered. Other matters emphasize this conclusion. A certain minor claim in this second mortgage was reserved for consideration upon facts to be thereafter found or agreed upon. This indicates that the existence of this second mortgage was known to the court at the time, and that the cross-bill setting it up was also known, and that by the rules of equity pleadings no determination of this claim could be had at that time without consent, and that the parties, not consenting, in respect to the general claim, had arranged in reference to this specific minor matter. Obviously, then, all parties understood that the general claim for a second lien was open for further consideration.

Again, its claim is stated along-side of the claims of intervenors, as though in respect to priority its claim to certain engines and cars stood upon the same footing as that of an intervenor, and that its second mortgage lien was not intended to be settled by this decree. Further, in the title of the cases in this consolidated case, no reference is made to the complainant in the cross-bill; nothing to indicate that such cross-bill was by consent, or otherwise, before the court for hearing and decree.

If I am at liberty to go outside of the record and turn to the oral testimony which is presented, it is equally obvious that at the time of this decree all parties interested regarded the second mortgage as of little moment. All thought that the first mortgages were so large as to sweep the entire property and leave large balances for general execution, and that hence a foreclosure of the second mortgage was a matter of little or no moment. The only thing deemed worth noticing was this claim to a priority as to a few cars and engines. Hence, testing the question by either the record itself alone, or also by the extrinsic facts, I am clear in the opinion that this second mortgage was not in fact foreclosed, and was not intended to be foreclosed at the time of and by this decree. Doubtless there was gross carelessness on the part of counsel for complainants in not having the second mortgage and the claims thereunder adjudicated, determined, and foreclosed, but their obvious carelessness does not change the fact as to what was done or intended to be done at the time.

Now, if the decrees themselves contain no foreclosure of this second mortgage, how can the sales, and the confirmation of such sales, cut off such second mortgage, or the rights of the bondholders thereunder? The sale goes not beyond the decree. It takes nothing and

carries no rights which the decree does not determine and prescribe; so I have little doubt that when the sale was consummated all that was accomplished was a foreclosure of the first mortgage, leaving all rights secured by the second mortgage undetermined and unenclosed.

The second question presented is this: Conceding that, as a matter of strict law, this second mortgage was not foreclosed, nor the rights of the holders of bonds secured thereby cut off, yet it is claimed that there is an equitable estoppel against any present assertion by such bondholders. A most elaborate and able argument has been presented by counsel upon this matter of estoppel. I think these propositions answer his argument:

First, a party is not estopped by remaining silent when he is under no legal or moral obligations to speak. Estoppel implies that the party has done, or omitted to do, that which, under the circumstances, he was legally or morally bound to do, or omit doing. If the party is under no obligations to speak, no estoppel can spring from his silence. If he is under no obligations to act, his failure to act concludes none of his rights. Now, I understand it to be accepted law that a second mortgagee is not bound to insist upon a foreclosure of his mortgage. It matters not whether the first mortgagee forecloses or not. The second mortgagee owes no duty to anybody to act. If the first mortgagee wishes to cut off his equity of redemption, it is the duty of such first mortgagee to make him a party and to take a decree against him; and if he fails to do that the second mortgagee is not concluded. The mere fact that he is made a party casts no obligations upon him. He may remain silent, and if no decree is taken against him, his rights remain as though he had not been made a party. No one would pretend that if not made a party his rights are cut off by his mere failure to come into court and ask to be made a party. In other words, in all proceedings by the first mortgagee, the second mortgagee stands on the defensive. His rights are perfect unless at the instance of the first mortgagee they are affirmatively cut off, or lost through the running of the statute of limitations.

Now, in this case the second mortgagee is a party. He sets up his mortgage. The first mortgagee takes a decree for the sale of the property to satisfy his mortgage, a decree barring the mortgagor, but not barring the second mortgagee; takes no foreclosure of such second mortgage; no finding of the amount due under such mortgage, and no order for the sale of the property to satisfy such second mortgage. Is the second mortgagee guilty of any wrong in not insisting upon a foreclosure of his mortgage? Is it not time enough for him to act when the first mortgagee demands some adjudication against him? May he not remain silent until such prior mortgagee asks foreclosure? That seems a clear statement of his rights, and I do not understand that any of the many cases cited by the learned counsel go so far as to hold that a party is estopped for remaining silent or in-

active where he is under no obligations, legal or moral, to speak or act.

Again, counsel spoke in argument, and have in brief, about the ambiguity of this decree, and of the consequent obligation on the second mortgage arising from such ambiguity. The entire record is a matter of public knowledge. Taking such record in its entirety, and I cannot doubt as to what is disclosed thereby, I cannot see that that ambiguity exists of which counsel speak. Neither mortgagor nor mortgagee, first or second, had any peculiar means of knowledge. The record was there and spoke for itself, and everybody was bound to take notice of what it disclosed. It did not show a foreclosure of this second mortgage. It does not purport to do so. It disclosed a cross-bill filed on the day of the decree with an answer thereto filed nearly a month thereafter. Who examining such a record can say that he was misled? The other matter of estoppel is this. The holders of some of these second mortgage bonds, as appears, were also holders of first mortgage bonds, surrendered such first mortgage bonds, and received bonds and stock in the reorganized company. But upon this, what estoppel arises? It is not pretended that they represented to anybody that they did not have these second mortgage bonds, or that they waived any claim by reason thereof, when they surrendered the first mortgage bonds. They may have thought, as others seem to have thought, that the property was worth so much less than the first mortgage bonds that nobody would ever think of the second mortgage. They had a legal right to surrender the first mortgage bonds, and take their interest in the new company; and when they said nothing, or did nothing, and exercised a plain legal right, how can it be said that some other legal right which they possessed, they abandoned? How does estoppel arise under these facts?

I am clearly of the opinion that all this trouble has arisen from the gross negligence of counsel, Messrs. Grant & Smith, and much as I should like to sustain this claim of an estoppel, I am unable to see any legal grounds therefor, and must hold that this second mortgage stands to-day unencumbered, and the bondholders not estopped from asserting their rights.

The question then arises whether this second mortgagee has an absolute right of redemption, and that is what is prayed. I think not. Neither a first or second mortgagee holds title or has absolute right of redemption as against the other mortgagee. The mortgagor alone has that right. When it makes a voluntary conveyance, or when its title is conveyed by judicial sale, the purchaser may succeed to such right of redemption. Regarding the foreclosure proceedings as completing mere execution sales, it would seem that the present holders have succeeded to the redemption right of the mortgagor. Whether that be universally and absolutely true or not, I think the right of redemption is one which a court of equity may award. It cannot be that the sec-

ond mortgagee has a settled legal and indisputable right thereto. Under the modern idea of mortgages, the mortgagee takes no title,—simply a lien. If he gets his money, all that he has a legal right to is secured. In this case it would seem that equity requires that the present holders of the title obtained by this foreclosure sale should have the right of redeeming from the lien of this second mortgage; and so the order should be that when the amount due under this second mortgage is ascertained, it is to be declared a lien upon the properties mortgaged, and that if not paid within a certain time the properties be sold to satisfy such lien. Such a decree would preserve the rights of the first mortgagees, as well as all rights secured by any parties subsequently obtaining interest in the property.

One further question requires notice. Obviously most, if not all, of the bonds secured by this second mortgage were issued as collateral security for certain debts of the mortgagor. Should such bonds to-day be treated as valid obligations for their face and interest, or as binding only to the extent of the debts secured thereby? I think the latter. Take the bonds held by the Lackawanna Iron Company, for instance. They were given as a collateral security only, and the present holder took them under such circumstances as to charge him with notice. Instead of being a debt for their face, all that the present property should be held liable for is the amount of the debt due to the iron company secured by these bonds. So in respect to others.

The order therefore should be that the matters be referred to the master of this court, to state—*First*, which of those bonds secured by this second mortgage were issued simply as collateral security for debts of the mortgagor; *second*, the present value of the debts secured thereby; and, *third*, if any of those bonds have been transferred from the holders of such debts, under what circumstances, and for what consideration they passed to the present holders. Upon the coming in of such report of the master, and finding of the amount which is properly secured by this second mortgage, a decree will be entered directing the sale of the mortgaged property within 60 days to pay such amount.

Costs will follow this cross-bill, and be charged upon the property.

CENTRAL TRUST Co. and another v. WABASH, St. L. & P. R. Co.
and others.¹

WABASH, St. L. & P. R. Co. v. CENTRAL TRUST Co. and others.¹

(Circuit Court, E. D. Missouri. April 28, 1885.)

1. EQUITY PRACTICE—INTERVENTION—SUIT TO HAVE GUARANTY ANNULLED.

A., a railroad company, having joined in the execution of a mortgage from B. to C., to secure the payment of bonds issued by B., and having guarantied the payment of said bonds, and 2,700 of said bonds being in the hands of a special receiver of this court appointed in the above-entitled case, and A. being under the control of the parties by whose privity said mortgage and guaranty were procured, D., a stockholder in A., asks leave to intervene here, or sue, in some other court having jurisdiction, said receiver, and the parties by whose privity said mortgage and guaranty were procured to be executed, for the purpose of having said guaranty, etc., annulled, and the further negotiation of said bonds enjoined, etc., on the ground that the execution of said mortgage and guaranty by A. was *ultra vires* and illegal, and authorized by a board of directors not legally elected. *Held*, (1) that said receiver is a proper party to a suit for the purposes aforesaid, to the extent, and only to the extent, of his interest in said bonds; (2) that this court will not permit said receiver to be sued outside of its jurisdiction; (3) that the petitioner may intervene upon showing that A. will not move in the matter.

2. CORPORATIONS—ACTS OF DE FACTO BOARD.

Semble, that the acts of a *de facto* board of directors are valid, whether all the members of the board are eligible and have been legally elected or not.

Consolidated Cases. In equity.

Application of Henry B. Plant for leave to sue the receiver.

The petitioner states that he is a stockholder in the St. Louis, Iron Mountain & Southern Railroad Company, and has lately been advised of the terms and conditions of a lease by the Wabash, St. Louis & Pacific Railroad Company of its property to the St. Louis, Iron Mountain & Southern Railroad Company, and of the existence, terms, and conditions of a certain paper purporting to be a mortgage of the Wabash Company's property to the Mercantile Trust Company, and to be executed by the said St. Louis, Iron Mountain & Southern Railroad Company, as party of the third part, to secure \$10,000,000 of bonds executed by said mortgagor, and the payment of the principal and interest of which purport to be guarantied by the said St. Louis, Iron Mountain & Southern Railroad Company; that as such shareholder he desires to institute the proper legal proceedings in this court, by intervening herein, or in some other court having jurisdiction of the subject-matter and the parties, against all the parties to said lease, mortgage, and guaranty, and against the persons by whose privity the same were procured to be executed, for the purpose of having the same and each thereof judicially annulled, and further proceedings thereunder or any negotiations thereof enjoined, and to recover from such persons individually the moneys which your petitioner believes were by them mis-

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

appropriated thereunder; and that said persons are some of them citizens of New York, one of Massachusetts, and one of Missouri, and were all directors of both said Wabash Railway and the said St. Louis, Iron Mountain & Southern Railroad Company at the time said instruments were executed; and that the grounds for such proposed proceedings are that the board of directors of the St. Louis, Iron Mountain & Southern Railroad Company, by which such proceedings purport to have been authorized, executed, and delivered, were never legally elected by the stockholders thereof; and that several of the directors were not eligible, under the laws of Missouri, to the offices which they assumed to occupy; and that said lease, and the said guaranty are voidable, because attempts to secure the consolidation of the two railways aforesaid, were contrary to the laws of Missouri; that said guaranty was *ultra vires*; and that the said St. Louis, Iron Mountain & Southern Railroad Company is now under the absolute control and in the sole possession of the parties whom the petitioner desires to sue, and others acting in concert with them.

Dyer, Lee & Ellis, J. B. Henderson, James M. Lewis, and T. K. S. Skinker, for petitioner.

Wager Swayne, Henry T. Kent, and Greene, Burnett & Humphrey, for the Wabash.

Phillip & Stewart, for the Central Trust Company.

Wells H. Blodgett, for receiver.

TREAT, J., (*orally*.) An application was made by Henry B. Plant some time ago to permit the receivers of the Wabash system to be made parties to one or more suits that he desired to institute in some other judicial tribunal. At the time the matter was presented to me, being here alone, I suggested that it should be heard before a full bench. The difficulties presented originally occurred to my brother judge and myself. Mr. Plant is an individual stockholder in the Iron Mountain road. He asks, as an individual stockholder, to institute a suit, instead of the corporation's attending to its own business, without conforming to the rule which I recognize as the original equity rule, and which has been emphasized by a written rule of the supreme court of the United States. Why should one stockholder undertake to perform the functions of a corporation? There may be reasons for his so doing. Possibly there were in this case. But whether so or not, it is unnecessary now to determine.

The original application has been so far modified as to ask permission to sue the special receiver, who has in custody 2,700 collateral bonds as a guaranty for certain indorsements made to help out this concern before the appointment of a receiver. There are a great many matters stated in that application with which this court has nothing to do; certainly not in the present aspect of the case, and probably in no conceivable aspect of the case. The enforcement by the state of its prerogatives by ousters and forfeitures belong to it, and not to this tribunal. We treat the corporation named, to-wit, the

Iron Mountain Railroad corporation, as an existing corporation. We treat its action through its duly-constituted officers as the action of a *de facto* board, and it does not become this court to go into an inquiry as to the validity of those matters which are before us for consideration by an attempted exercise of mere state authority. The charter is good until the state chooses to forfeit it, and these directors are duly elected unless in consequence of some provision of the statute they should be ousted. Behind all that, however, is the important question here.

Of course, this court will not permit its receiver, he not being a necessary party, nor even a proper party, to any such proceeding, elsewhere to be involved in that litigation with which he has nothing to do, and thus tie up this whole receivership for an indefinite period of time. Yet there is one, and only one, aspect of the case in which the special receiver should be a party, to-wit: Are the guaranties made by the Iron Mountain Company on the 2,700 bonds, now in the hands of the special receiver, valid? To that extent, and to that alone, would the receiver be a proper party to the proceeding. It might originally have been supposed that the lease made to the Iron Mountain Company, this party stockholder wished to invalidate. But that lease has ceased to exist. One of the original orders of this court in respect thereto was that the Iron Mountain Railroad Company should surrender that lease, and it has done it. Hence all that Mr. Plant wants in that direction has been accomplished by this court. Now he asks that our receivers shall go into other courts to have the question determined whether the guaranty of those bonds is valid or invalid. This court considers itself perfectly competent to pass upon that question. It is a necessary part of the controversy before this court. This court will determine it, and will not remit it to other tribunals; for if other tribunals should happen to decide differently from what this court might think correct, a strange question would be presented as to conflicting authority.

It suffices as far as Mr. Plant is concerned, if he wishes to raise that question he can intervene here, on showing that the corporation will not do what he wants; but why send the corporation to New York or to California to do the work which this court ought to do?

The motion will be denied.

McLEAN v. CLARK.

(Circuit Court, E. D. Michigan. May 25, 1885.)

1. EQUITY PRACTICE—DOCKET FEE—OVERRULING DEMURRER.

Where a demurrer to a bill in equity is overruled, and defendant has leave to answer, the plaintiff is not entitled to tax a docket fee of \$20, as upon a final hearing.

2. SAME—DOCKET FEE, WHEN TAXABLE.

Such docket fee can only be taxed upon a hearing which is final in fact, and results in a disposition of the merits of the case.

In Equity.

On application to tax a docket fee of \$20, in favor of the plaintiff. Defendant demurred to the bill, and the demurrer was overruled. Leave was given to answer over, and an answer was filed. Plaintiff then applied for the taxation of a docket fee of \$20, upon overruling the demurrer, as upon a final hearing.

Mr. Angell, for plaintiff.

BROWN, J. By general equity rule 34 the defendant has a legal right to answer the bill, upon the overruling of his demurrer, upon payment of costs up to that period. Under such circumstances it seems to me that the hearing upon the demurrer is not a "final hearing" within the meaning of Rev. St. § 824. It is true that in the cases of *Alley v. Nott*, 111 U. S. 472, S. C. 4 Sup. Ct. Rep. 495, and *Scharff v. Levy*, 112 U. S. 711, S. C. 5 Sup. Ct. Rep. 360, it was held that a hearing upon a general demurrer to a complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, was "a trial" within the meaning of the removal act of March, 1875. We apprehend, however, that this principle does not necessarily control the question before us. In determining what *shall be* considered as a trial of the action, before which the petition for removal must be filed, the court naturally treats that hearing as a trial which *may*, although it will not necessarily, dispose of the whole case. A different construction would enable a party to speculate upon the result of his demurrer in the state court,—accepting its decision if favorable, and removing the case if adverse to him. But in determining what *has been* "a trial or final hearing" which will authorize the taxation of a docket fee, we think that regard should be had to the result of such hearing or trial, and that we should treat that only as a final hearing in law which is a final hearing in fact. Hence, if, in this case, the demurrer had been sustained, and the bill dismissed, the hearing of such demurrer would undoubtedly have been a final hearing, within the meaning of section 824. This I understand to have been the ruling in *Price v. Coleman*, 22 FED. REP. 694; although the facts of the case are not fully stated in the report. But if, upon the hearing, the demurrer is overruled, and leave is given to answer, the hearing is not final and does not dispose of the case.

That the words "final hearing" do not always receive the same construction is apparent from a reference to those cases wherein the question, what is an appealable decree, is considered. The practice in this connection is well settled that it is only such decrees as decide and dispose of the whole merits of the case, and reserve no further questions or directions for the future judgment of the court that are final decrees from which an appeal will lie to the supreme court. *Beebe v. Russell*, 19 How. 283.

In *The Palmyra*, 10 Wheat. 502, upon a libel for a tortious seizure, an appeal was taken from a decree restoring the vessel, with costs and damages, but the damages had not been assessed, and it was held that the decree was not final. See, also, *Chace v. Vasquez*, 11 Wheat. 429; *Pulliam v. Christian*, 6 How. 209. So, also, in the case of *The Mary Eddy*, (*Mordecai v. Lindsay*,) 19 How. 199, it was held that a decree in favor of the libellant upon the merits, with a reference to a commissioner to report the damages, was not a final decree from which an appeal could be taken. In *Coy v. Perkins*, 13 FED. REP. 111, Mr. Justice GRAY and Judge LOWELL, held that upon the face of this statute the intention of the legislature was manifest that it was only where some question of law or fact, involved in or leading to the final disposition actually made of the case, has been submitted, or at least presented, to the consideration of the court that there can be said to have been a final hearing which warrants the taxation of a docket fee. See, also, *Huntress v. Epsom*, 15 FED. REP. 732.

A different rule has apparently been adopted in one or two of the more recent decisions in New York. In these cases the definition of the words "trial" and "final hearing" used in the removal cases was treated as controlling; but for the reasons before stated it seems to me that where the question arises upon proceedings taken *after the hearing*, that can only be treated as a final hearing or decree which disposes of the merits of the case, and virtually puts an end to the litigation.

I am authorized to say that the circuit judge concurs in this opinion.

CENTRAL TRUST Co. and another v. WABASH, ST. L. & P. RY. Co.
and others.¹WABASH, ST. L. & P. RY. Co. v. CENTRAL TRUST Co. and others.¹

(Circuit Court, E. D. Missouri. April 16, 1885.)

1. RECEIVERS—RAILROADS—MORTGAGOR AND MORTGAGEE—LESSOR AND LESSEE—
MANAGEMENT OF NON-PAYING BRANCHES AND LEASED LINES.

The Wabash, etc., Railway Company is composed of a number of consolidated railroad companies, and has in its system a number of leased lines. Before entering the consolidation, the different companies composing it had mortgaged their respective properties to secure issues of bonds. After the consolidation was formed, the consolidated company issued bonds and gave a general mortgage to secure their payment. Subsequently, becoming unable to pay the interest on its bonded indebtedness, it applied for the appointment of receivers for the benefit of all concerned. Receivers were appointed, and ordered to keep the system in the condition of a going concern, but to keep the accounts of the different lines separately. The court authorized them to issue their certificates in order to pay lien claims, and the certificates so authorized were made a first lien upon the entire system. Some of the branches earned more than enough to pay expenses, and the receivers, without the sanction of the court, used this surplus in the payment of lien claims, and general running expenses instead of issuing certificates. Some of the branches belonging to the company and some of the leased lines were found to fall far short of paying running expenses. This state of facts having been brought to the notice of the court by a report of the receivers, and instructions asked for concerning the future management of the system, and it having been suggested that the leases on non-paying lines should be canceled, and all parties in interest having been heard, it was held: (1) That where any subdivision earns a surplus over expenses, the rental or subdivisional interest should be paid to the extent, and only to the extent, of that surplus. (2) That where any surplus earned by a subdivision has been diverted by the receivers for general expenses, it should be made good at once. (3) That where a subdivision earns no more than its operating expenses, no rent or subdivisional interest should be paid. (4) That where a lessor or subdivisional mortgagee desires possession or foreclosure, he should have liberty to assert his rights. (5) That the entire system should be kept in the condition of a going concern while it remains in the receivers' hands. (6) That where a subdivision fails to pay operating expenses, they should, if possible, be reduced until they do not exceed its income. (7) That where it is necessary, in order to keep a subdivision in the condition of a going concern, the receivers shall issue certificates which shall be a first lien on the system, for the purpose of raising necessary funds, and all equities respecting such certificates should be adjusted in the final decree.

2. SAME.

After the appointment of receivers in the suit instituted by the Wabash road, the trustees in the general mortgage brought suit to foreclose, and the two cases were consolidated. After the consolidation the complainants in the foreclosure suit moved that the receivers who had been appointed be reappointed as their receivers; but the order asked for contemplated a seizure of part only of the properties then in the receivers' possession. *Held*, that the receivers who had been appointed, acted neither for the mortgagor nor the mortgagee, but for the court, and for that reason, and because the court had taken possession of the system, with the intention of preserving it in its integrity, the motion must be overruled.

Consolidated Cause. In equity.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

On the twentieth of March, 1885, the report of Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis & Pacific Railway Company, was filed herein. It showed among other things, the earnings and expenses of the leased and branch lines of said road for the period commencing on the twenty-ninth day of May and ending on the thirtieth day of November, 1884, and that some of the branch and leased lines were being operated at a very heavy loss, a loss which in one instance had amounted to \$167,000, during the period named. In closing their report the receivers prayed for orders with respect to the future operation of said lines, and concerning the payment of interest, and the respective rentals agreed to be paid by said company in the several leases and agreements set forth in the report, and it was suggested by the attorney for the receivers, when the report was presented, that the best course to pursue under the circumstances would perhaps be to cancel the leases on those lines which were not paying expenses. The court thereupon instructed the receivers to send a copy of their report to each of the lessors and other parties in interest, and notify them that on April 10th following, application would be made by the receivers for some action by the court as to the future retention and operation of the leased lines. On the tenth of April the matter came up for hearing, and after a full discussion the following opinion was delivered, and ordered by the court to be spread upon the records as its order in the premises. The motion concerning the reappointment of receivers, referred to in the opinion, was made in the case of *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*; and asked in substance that the receivership existing in the suit of the Wabash, St. Louis & Pacific Railway Company be extended to that cause, and receivers be appointed under the bill of foreclosure theretofore filed by the said complainants, the Central Trust Company and James Cheney.

The motion of Mr. Hagerman referred to was oral and informal. He said to the court, in the course of the discussion concerning the application of the receivers, that he represented certain bondholders of the Toledo, Peoria & Western Railway Company, one of the branch lines, and that his clients wanted either the interest due them on their bonds or the road, etc. For a history of this case see 22 FED. REP. 272.

Wells H. Blodgett, for receivers.

Wager Swayne, Burnett & Humphreys, and *H. T. Kent*, for the Wabash.

Butler, Stillman & Hubbard and Philips & Stewart, for the Central Trust Co.

James Tausig, Pattison & Crane, J. E. McKeighan, C. B. Adams, Hough, Overall & Judson, John D. Davis, W. H. Bliss, James Hagerman, W. B. Sheldon, Foster & Thompson, McDonald, Butler & Mason, Motter & Judson, and D. H. Chamberlain, for lessors, bondholders, etc.

BREWER, J., (orally). Several questions have been presented to us

the last few days, concerning which we have come to a conclusion, and perhaps we had better dispose of those before proceeding with the hearing of other matters. * * *

Now, recurring to the general questions that are presented, we name some half dozen matters, which, we think, should be passed in the form of an order or orders; and let me preface them with a brief statement.

This Wabash road is composed of many subdivisions. While it is a single corporation to-day, yet into it have passed many corporations, and many separate railroad properties. In administering such a consolidated property the court must look at, not merely the interest of the mortgagee in this general mortgage, or of the mortgagor as a single entity or corporation, but also the separate and sometimes conflicting interests of the various subdivisions and their respective incumbrances; and, back of all that, the duty which every railroad corporation owes to the public. For underlying the rule which the supreme court has laid down in respect to the payment, by receivers when they take possession of railroad property, of prior unsecured debts recently accrued, runs the thought, as expressed by the supreme court, that a railroad corporation owes a duty to the public which has given it its franchise and enabled it to construct its road; the duty of operating that road for the benefit of the public. While that may not be what you may call an absolute duty, enforceable under all circumstances, it is still a duty to be regarded and enforced by the courts when they take possession of railroads through their officers. And that duty is not limited to the operation of merely that particular fragment of a road which is pecuniarily profitable in its operations, but it extends to the road as an entirety, and to all its branches—all its parts; differing in that particular from the duty which would rest upon the court if it had simply taken possession of property used for private purposes, manufacturing or otherwise, where the single question might well be said to be one of pecuniary profit. This Wabash road, as a system, was in operation, a going concern, from one end to the other; as such, discharging its duties as best it could to its various creditors. This court, at the instance of the corporation, and to preserve the integrity of this system, took possession of it by its receivers. It took possession of it as a going concern, and, so far as is reasonable and practicable, it should continue it as a going concern until it surrenders it to whoever may be the purchasers or future holders of it.

With that preface, and calling these separate branches which have passed into this consolidated road, subdivisions, since some have passed in by way of lease and others by way of consolidation, subject to separate mortgages, we pass orders substantially as follows:

The first is one which has already been entered, and we simply emphasize by repeating it, that subdivisional accounts must be kept separately. That was an order passed by Brother TREAT at the

very outset of this receivership, in order that the particular equities of each one of these divisions, as between themselves, might be ascertained.

2. Where any subdivision earns a surplus over expenses, the rental or subdivisonal interest will be paid to the extent of the surplus, and only to the extent of the surplus. Any past diversion of such surplus for general operating expenses will be made good at once, and, if need be, by the issue of receivers' certificates. Thus, for illustration, this Toledo, Peoria & Western Railroad appears by the report to have been earning a surplus over its operating expenses. That surplus is not the full rental price, yet even that has not been paid to the lessor, having been used for general operating expenses. Any net earnings should be paid over to the lessor, or, if there be a subdivisonal mortgage, to the mortgagee, and any such diversion as that should be made good, and good at once. At the inception of this receivership an order was passed authorizing the issue of \$2,000,000 receivers' certificates for the payment of such amount of prior debts for labor and material. Those have been partially paid, and without the issue of all of the certificates authorized, only a half a million having been issued. The receivers, hoping, doubtless, that the business of the road would continue to be such that they need not issue more than half a million receivers' certificates, have diverted funds, which should be applied to the payment of these rents, to the payment partially of this past indebtedness. To that extent the diversion should be restored.

3. Where a subdivision earns no surplus, simply pays operating expenses, no rental or subdivisonal interest will be paid. If the lessor or the subdivisonal mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized. That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo division; but the proceeding for disruption will come from the subdivisions. The court is not sloughing off branches, tearing the system in two; but the disruption, if it comes, will come from those who seek separation, and have a legal right so to do.

4. Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph & St. Louis branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand; that is, if a subdivision does not earn operating expenses, and the receivers are running two trains a day, then lop one of them off. If they are running one train a day, and still it does not pay, then run one train in two days. While the court will endeavor to keep that subdivision in operation, it will make the burden of it to

the consolidated corporation, and to all the other interests put into that consolidated corporation, a minimum. We have used the term, "with an unsparing but a discriminating hand." By this we mean that certain things must be left to the discretion of the receivers. It may be that running one mixed train, proffering slight accommodation to the traveling public, would work a greater deficit than two trains,—one furnishing the conveniences of a passenger train, and the other purely a freight train. That must be left to the discretion of the receivers. The court is not in a position to determine as to what, in any particular case, will be most likely to work out a minimum deficit. If there is any controversy hereafter arising under the management of the receivers respecting any reduction, why all the parties interested can apply to the court. Some of these branches across the river seem, upon the map at least, to be so situated in respect to connections that a limited number of trains would answer all the real demands of the public, and that they would be operated with a very slight expense. Suppose, as of course it may be expected, that there will continue to be a deficiency in the operating expenses of such subdivisions, such deficiency will be paid out of the general earnings of the consolidated road, or, if need be, by the issue of receivers' certificates.

While we are both of us loath to go into the receivers' certificate business, and do as little of it as is reasonably possible for a court having such large properties in its hands, yet in such a case we think the emergency arises. Suppose we take possession of a single short line, (and we have in one or two other cases,) the continuance of that as a going concern is emphasized more than once by the supreme court as a duty, as a reason for paying prior indebtedness, and also as a reason for issuing receivers' certificates. Stop operating it, and it becomes a dead concern; its connections are broken up, and its value is impaired. Therefore, to preserve that value, the courts have said that it is right in a limited degree to issue receivers' certificates, and if that be true where the court has but a single line, it is equally true where it has a road with various branches, and as to all of those branches. The value of any branch abandoned is diminished; and the court may not consider simply the interests of the consolidated company, the mortgagor, and the trust company, the mortgagee. It is bound to regard the interests of each one of these subdivisions that went into the consolidated company, and thus into the receivers' hands; and if the court may and ought to issue receivers' certificates, in order to keep a single line a going concern, so, having possession of this system, with its various branches, for the same reason, and by the same means, it should keep each one of them in operation.

There will be no modification of the order heretofore entered concerning receivers' certificates, but all equities respecting them as between the various subdivisions will be adjusted in the final decree. There may be, as counsel strenuously urged yesterday, a great many

equities as between the various subdivisions in respect to the final burden of these receivers' certificates; but they have been authorized for only such claims as if no receivers' certificates had been issued; and the road, not taken possession of by the court, could have been cast into liens prior to all mortgages upon the road and all its branches; any single labor or material claim could have been cast into a lien which would have been a first lien on the North-Missouri road,—a lien antecedent to all its mortgages,—and there is no impropriety in substituting receivers' certificates for that kind of claim. It simply puts it on the same basis as the claim stood before the certificate was issued. When it comes to a sale of the road or other final disposition of the matter, it may be there will be such equities as will justify the casting of the burden of these certificates upon one subdivision rather than another. If the road goes into a single sale as an entirety, the purchaser has got to take the burden of these receivers' certificates, and before the court passes the road out of its hands the receivers' certificates will be paid.

Application also is made for the reappointment of receivers; or, as stated in the language of the motion, for extending the receivership to the trust company—the mortgagee in the general mortgage. I confess that I do not wholly understand why such an order as that is asked, and I cannot appreciate what counsel mean when they say, "Make the receivers receivers for the trust company,—the mortgagee." As we look upon it the receivers are not receivers for either party. They are simply the hand of the court. In the process of the litigation the court has taken possession of the property, and holds it neither for the mortgagor nor the mortgagee, and it matters not, for the ultimate determination of the suit, at whose instance the receivers were appointed. They act for neither party. They represent neither party. They stand here simply as the hand of the court, holding the property for disposition at the end of the litigation, for the benefit of all. So I cannot see what can be gained as a legal proposition by a new order of appointment extending the receivership, as counsel say, to the trust company, the mortgagee. The receivers will have no greater power,—no different power,—would owe no different duty, and would be no more and no less subject to the orders of this court than they are now, and certainly they would have no right in the operation of their trust to extend favors to the one side or the other. Furthermore, as receivers appointed at the instance of the mortgagor in the first instance, they took possession of the entire properties while this order, as tendered, contemplates a seizure of part only of these properties, not all. Having taken possession of the road under the idea in the first instance that the integrity of the system had a value and should be preserved, it seems to us the receivership should continue right along in that line. There will be no reappointment of the receivers.

The motion of Mr. Hagerman, representing certain bondholders of

the Toledo, Peoria & Western Railroad Company, must be overruled. We cannot turn the road over to the bondholders or force it upon trustees if they do not come here and ask for it. Partially, of course, the motion accomplishes its purpose, in that the order will pass, as stated above, for paying over the surplus earnings as rent to the corporation.

I believe that minutes all the matters concerning which we have come to a conclusion. My brother TREAT may wish to emphasize some portions of it.

TREAT, J. I think you have covered all the points.

HOLT and others v. MENENDEZ and others.

(Circuit Court, S. D. New York. 1885.)

1. TRADE-MARK—ARTICLE NOT MANUFACTURED BY OWNER OF MARK.

The word "La Favorita," as applied to flour, may be a valid trade-mark although the flour is not made by the party using the trade-mark, but is selected and classified by him, such selection requiring skill, judgment, and expert knowledge.

2. SAME—LACHES—INJUNCTION—ACCOUNTING.

When a complainant has allowed a party to go on for 14 years using his trade-mark without taking any proceedings to protect his rights, an injunction to prevent further infringement may be granted, but an accounting will not be decreed.

3. SAME—"LA FAVORITA" FLOUR.

The right of complainants to the use of "La Favorita" as a trade-mark applied to flour sustained.

In Equity.

S. St. J. McCutchin and Rowland Cox, for complainants.

John Henry Hull, for defendants.

COXE, J. This is an action to restrain the infringement of a trade-mark. The complainants are engaged in the flour and commission business in the city of New York, under the firm name of Holt & Co. The firm was organized 40 years ago, and, with the inevitable changes wrought by time, has continued in the same business ever since. In 1861 they commenced to use, and have since continuously used, to distinguish a certain flour prepared by them, the trade-mark in question, "La Favorita." The trade-mark was registered in the patent-office, February 28, 1882.

The defendants, admitting the use of the name "La Favorita," contend that they are privileged to use it for the reason that the flour sold by them was procured from one S. Oscar Ryder, who, from 1861 to 1869, was a member of the firm of Holt & Co., and thus acquired a right to the trade-mark, which, in the absence of an express re-

linquishment, he retained after his withdrawal from the firm. The defendants insist, also, that the use of the words "La Favorita," as a brand for flour, did not originate with the complainants; that as they use it to distinguish flour manufactured by others, and merely selected by them, there can be nothing to support a trade-mark; and, finally, that whatever rights the complainants once had have been forfeited by inexcusable laches in asserting them.

The position that Ryder retained an interest in the trade-mark, after his connection with the firm had been severed, cannot be maintained. Holt & Co. was a firm of character and influence. For years it had preserved its credit and good name unshaken and unimpaired. The trade-mark "La Favorita" was originated, so far at least as the New York market was concerned, by its senior member. The brand was inseparable from and almost synonymous with Holt & Co. Whatever value it had was due to the exertions and reputation of the members of the firm. Its meaning, as a brand for flour, had been imparted to it by them. The moment its use became general it ceased to be valuable. Ryder had been a clerk, and from that position was promoted to a partnership. His retirement was an event of but little more importance than the change of a book-keeper or salesman. The firm still lived. It was the intention of the remaining partners to continue to transact the old business in the old way. That Holt & Co., desiring to retain the good-will of the firm unimpaired, should have permitted Ryder to despoil them of the distinguishing brands upon which their success largely depended, without a word of remonstrance, is hardly credible. But when to the presumptions thus arising is added the positive testimony that at the time of his withdrawal Ryder expressly released all right to the copartnership brands, followed by his equivocal denial, it is very clear that the defense based upon his title must fail. Proof and probability unite in pointing to this conclusion.

Regarding the defense of want of originality it must be said, in addition to the fact that it is not pleaded, that the evidence relied on is not free from uncertainty and doubt. But even should the finding be made that a few years before it was adopted by Holt & Co., the name "La Favorita" was used at St. Louis as a brand for flour, it must also be said that the use was casual and fortuitous and continued for a short period only. As a distinguishing brand for flour at St. Louis it was soon abandoned and forgotten.

There is no merit in the proposition that the complainants' trade-mark cannot be sustained for the reason that the flour is not manufactured by them. The proof is uncontradicted that selection and classification require skill, judgment, and expert knowledge, and add value and reputation to the flour when made by those in whom purchasers have confidence. The case of *Godillot v. Harris*, 81 N. Y. 267, seems conclusive upon this point.

Upon the question of laches, however, I am constrained to say that

the complainants' conduct has been such that the relief granted must be limited to an injunction. Ryder commenced using the brand in 1869, and has used it continuously since. That the complainants knew of this, certainly as early as 1871, is not disputed. That they protested at all is denied. Certainly there was no vigor or courage shown by them until just prior to the commencement of this suit, in 1882. That they did not consent is true, but it is equally true that, for men who believed their rights invaded, their course was inconsistent and misleading. Ryder might well have imagined that they did not intend to call him to an account. The circumstances were such as to justify the belief on his part that he was licensed by silence to use the trade-mark. It would be inequitable to compel him to pay for its use during the long years that the complainants slept upon their rights.

In endeavoring to reach a just result the court should not overlook the fact that the delay in commencing the suit was unreasonable, and that some of the evils of which the complainants complain are attributable to their own laches in this regard. The facts seem to bring the case within the doctrine of *McLean v. Fleming*, 96 U. S. 245.

There should be a decree in favor of the complainants for an injunction, with costs.

DE KUYPER and others v. WITTEMAN and others.

(Circuit Court, S. D. New York. January 12, 1885.)

TRADE-MARK—INFRINGEMENT—PRINTING AND SELLING IMITATION LABELS TO THIRD PARTIES.

Printing and selling labels in imitation of a trade-mark, with the purpose of enabling the parties to whom the labels are sold to palm off their goods upon the public as the goods of the owner of the trade-mark, is a violation of the rights of such owner.

In Equity.

Rowland Cox, for plaintiff.

B. B. Foster, for defendant.

WALLACE, J. The demurrer in this case is without merits. The complainants, upon the facts shown in the bill of complaint, have a good title to their trade-mark, and a case for its protection irrespective of their statutory rights under the registration in the patent-office. As the necessary diversity of citizenship exists between the parties, they are entitled to invoke the jurisdiction of this court.

Upon the allegations of the bill the defendants are actively engaged in assisting third persons to use the complainants' trade-mark in violation of their rights. The mere act of printing and selling labels in imitation of the complainants' might be innocent, and, without evi-

dence of an illicit purpose, would not be a violation of the complainants' rights. It is otherwise, however, when this is done with the obvious purpose of enabling others by the use of the labels to palm off their goods upon the public as the goods of the complainants.

The demurrer is overruled, with costs. Defendants may answer upon payment of costs.

HILL v. CITY OF MEMPHIS.¹

(Circuit Court, E. D. Missouri. April 27, 1885.)

1. MUNICIPAL BONDS—LOANS OF CREDIT BY MISSOURI TOWNS—SPECIAL ELECTIONS—ACT OF MARCH 21, 1868.

Where, in a suit upon bonds issued by the town of Memphis, Missouri, in payment of a stock subscription in the N. M. R. R. Co., a record of a special election had under the act of March 21, 1868, to authorize the defendant to issue said bonds, was introduced in evidence, and it appeared therefrom that the election was only ordered 12 days before it took place, *held*, that the record showed upon its face that the election was illegal, and the issue of bonds unauthorized.

2. CONSTITUTIONAL LAW—BONDS—ACT OF MARCH 24, 1868, TO ENABLE TOWNS, ETC., TO FUND THEIR DEBTS.

If the act of March 24, 1868, by the general assembly of Missouri, entitled "An act to enable counties, cities, and incorporated towns to fund their respective debts," contemplated a right in towns to subscribe stock thereafter and issue bonds, or to issue bonds for subscriptions under old charters, without any special election authorizing the issuing of such bonds, it is contrary to section 14, art. 11, of the Missouri constitution of 1865, and invalid.

At Law. Motion for a new trial and motion for rehearing.

The record of election offered in evidence in this case shows upon its face that on January 26, 1871, the special election in question was ordered for February 7, 1871, and was held on that day, only 12 days after the order was made.

Section 4 of article 2 of the Missouri constitution of 1865 provides that after the enactment of registration laws "no person shall vote unless his name shall have been registered at least ten days before the day of election." The act of March 21, 1868, concerning the "Registration of Voters" provides (section 18) that "the clerk of the county court shall, 20 days before any special election, * * * cause to be delivered to the board of registration, or any member thereof, the books of registration, who shall immediately proceed to register qualified voters." Section 2 of the same act provides that notice shall be given in each district 10 days before the first session of the board of registration. Section 14, art. 11, of the Missouri constitution of 1865, declares that "the general assembly shall not authorize any

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

county or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto.

The act of March 24, 1868, referred to in the opinion of the court is entitled "An act to enable counties, cities, and incorporated towns to fund their respective debts;" and provides "that the various counties of this state be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and all counties, cities, or towns in this state, which have or shall hereafter subscribe for the capital stock of any railroad company, may, in payment of such subscription, issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached."

The charter of the N. M. R. R. Co. referred to in the opinion of the court (Laws Mo. 1851, p. 483) specifically gave *counties* power (1) to subscribe stock; (2) to issue bonds to raise funds to pay such subscription; (3) to take proper steps to protect the credit of such county and in the same section merely authorized *towns* to "subscribe to the stock and appoint an agent to represent its interests."

Judgment having been given for the plaintiff, the defendant moved for a new trial, and the first of the following opinions was delivered thereon April 13, 1885.

Hough, Overall & Judson, F. T. Hughes, and A. J. Baker, for plaintiff.

Henry A. Cunningham, for defendant.

TREAT, J. Under the decision heretofore rendered in this case, the city of Memphis had no authority to issue bonds for a subscription to the railroad unless authorized so to do at an election held therefor. During the trial the record of the alleged election, whereby the bonds would be validated, was offered in evidence, under objections by the defendant. Without passing on each of the various points for a new trial, it must suffice that the record of the election on its face shows non-conformity with the positive requirements of the statutes. Hence the court was in error in its rulings with respect to said record. The motion for new trial will therefore be granted, without considering the other points involved, inasmuch as the effect of said record must be conclusive in this suit as to the rights of the parties.

In order that the parties litigant may not be involved in further expense and costs, it may be well to state that the record of the election on its face shows that there was no authority for the issue of the bonds sued on. The parties, if they so elect, can submit the case on the evidence heretofore offered, and thereupon judgment would necessarily be given for the defendant. The matters of estoppel heretofore presented would not prevail in the absence of authority for the issue of the bonds.

A motion for a rehearing having been made by the plaintiff, and the matter reargued, the following opinion was delivered April 27, 1885:

TREAT, J. When this case was before the court at a former term, it was held by Judge McCrARY that the authority of the defendant to subscribe stock under the railroad charters did not carry the right to issue bonds in payment thereof; hence, as that power must be derived from some other source, there being no estoppels by the recitals in the bonds, the plaintiff must produce evidence of such authority. The record of a special election had under the act of March 21, 1868, was produced, whereupon it was held, on the motion for new trial, that the same was void on its face; consequently, as no authority for the issue of the bonds existed, the bonds themselves were therefore void. On the reargument the attention of the court has been directed to the act of March 24, 1868; the other act referred to bearing date March 21, 1868. Under the constitution of 1865 registration of voters was exacted for either general or special elections, under such provisions as the legislature might prescribe with respect thereto. Legislation describing the details will be found in said act of March 21, 1868, conformity with which was not had. By the terms of the constitution, no county, city, or town, could become stockholders, or *loan its credit*, to any corporation, unless two-thirds of the qualified voters at a regular or special election should assent thereto. Although, under the rulings of the supreme court of Missouri, the right of defendant to subscribe to the stock of the corporations named existed, yet there was no right to issue bonds or loan its credit in payment of such subscription, except by complying with said constitutional provision. Hence, if the act of March 24, 1868, contemplated a right to subscribe thereafter, and issue bonds, or to issue bonds for subscriptions under old charters, irrespective of the needed vote, the same would be invalid. In this case it fully appears that no authority to issue bonds was had under a valid election. The views of the court heretofore expressed are still adhered to, despite said act of March 24, 1868.

Motion overruled.

ROBBINS v. SEARS.¹

(Circuit Court, E. D. New York. February 24, 1885.)

BROKER—AGENCY FOR BOTH PARTIES.

A broker who negotiates the hiring of a steam-boat cannot act as agent of both parties to the transaction, so as to be entitled to pay for his services from each, unless they understood his position and expressly agreed to such payments.

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

Motion for New Trial.

T. C. Cronin, for plaintiff.

Scudder & Carter, for defendant.

WHEELER, J. This action is brought to recover commissions as broker on negotiating the hiring of a steam-boat by the defendant of one Wright. The case shows that the plaintiff received a commission from Wright for negotiating the letting of the steam-boat to the defendant. He could not act as the agent of both parties to the transaction so as to be entitled to pay for his services from each, unless they understood his position, and expressly agreed to such payments. *Dunlop v. Richards*, 2 E. D. Smith, 181; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rowe v. Stevens*, 53 N. Y. 621; *Carman v. Beach*, 63 N. Y. 97. Payment for procuring the letting to the defendant would include payment for procuring the hiring by the defendant, unless there was an express agreement to pay more. There was no evidence that the parties agreed to the payment of any more commission than Wright paid. There was evidence that defendant agreed to repay to Wright one-half of what he was to pay to the plaintiff, and that the plaintiff afterwards spoke to defendant about money for services, and that the defendant said it would be fixed when the charter-party was signed. This is all the evidence there was in respect to any agreement by defendant to pay commissions. It was argued that this did somewhat tend to show an express agreement to pay beyond what Wright paid, and the case was submitted to the jury in that view. But this remark, if made, is referable as well to what was coming from Wright as to any additional commission, and falls far short of being sufficient to uphold the verdict finding an express agreement of defendant to pay commissions in addition to what Wright paid.

The motion of defendant to set aside the verdict for plaintiff, and for a new trial, is granted.

It is a well-settled and salutary principle of law that no agent will ever be allowed to take upon himself incompatible duties and characters, or to act in a transaction where he has an adverse interest or employment.¹ And the rule is sometimes laid down, in general terms, that the same person cannot be the agent of both parties to a transaction.² In this case, it was correctly held that, in making a contract for the composition of a debt, the same man could not be the agent of both parties, but that, when the composition was agreed upon with the creditor by the agent of the debtor, he could become the agent of the creditor for another and distinct purpose, such as holding the money for the use of the creditor. So a person standing in the position of agent of both parties cannot execute a mortgage as the attorney of one for the benefit of the other.³

A contract, however, thus made by a person as the agent of both parties is not void, but only voidable at the election of the principal, if he comes into court on timely application.⁴

¹ *Evans' Agency*, *14; *Dunne v. English*, L. R. 18 Eq. 524.

² *Hinckley v. Arey*, 27 Me. 362.

³ *Greenwood v. Spring*, 54 Barb. 375.

⁴ *Greenwood v. Spring*, *supra*.

It is not necessary for a party seeking to avoid such a contract to show that any improper advantage has been gained over him. He has the option to repudiate or affirm the contract, irrespective of any proof of actual fraud.¹

In *Sumner v. Charlotte, C. & A. R. Co.*² it was said that the law does not favor double agencies. Where, therefore, it appeared, in an action for damages against the railroad company, that the plaintiff had employed one C., who was a depot-agent of the defendant, to purchase cotton for him, and to hold and ship it under his directions, it was held that C., in so dealing in cotton for the plaintiff, acted solely as the plaintiff's agent, and there was no liability in the defendant for any loss resulting from the failure of C. to perform his duty as such agent.

In *Adams Mining Co. v. Senter*,³ and in *Colwell v. Keystone Iron Co.*,⁴ however, the rule is more accurately laid down that there is no principle of law which precludes a person from acting as agent for two principals. In the former case, CAMPBELL, J., referring to the claim that the double agency in the case (the same person being the agent of two neighboring mines) involved a conflict of duties, and that all of the agent's dealings, whereby the property of one company was transferred to or used for the other, should be held unlawful, said: "There is no validity in such a proposition. The authority of agents may, when no law is violated, be as large as their employers choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relations. Every survey of boundaries by a surveyor, jointly agreed upon, would come within similar difficulties. *It is only where the agent has personal interests [the italics are our own] conflicting with those of his principal, [or where the interests of the two principals are adverse or incompatible,] that the law requires peculiar safeguards against his acts.* There can be no presumption that the agent of two parties will deal unfairly with either; and when they both deliberately put him in charge of their separate concerns, and there is any likelihood that he may have to deal with the rights of both in the same transaction, instead of lessening his powers, it may become necessary to enlarge them far enough to dispense with such formalities as one man would use with another, but which could not be possible for a single man to go through with alone."

In *Colwell v. Keystone Iron Co.*⁵ it was accordingly held competent for a person in the general employ of the vendor to accept, by the consent of all parties, as agent of the vendee, the delivery of the property sold.

The fact that the purchaser of negotiable paper, resident in a distant part of the state, employs to collect the same a person who is also an agent for the payee, is not very significant of bad faith.⁶

While a person cannot properly be the agent of both parties, buyer and seller, yet if he accepts the position of agent for the buyer without disclosing the fact that he is agent for the seller, he cannot afterwards repudiate such position to shield himself from liability to the buyer, on the ground that he was agent for the seller. Having assumed the relation of agent for the buyer, he must be held to a strict performance of the duties, and to all the liabilities the relation imposes.⁷ Where an agent is employed by several principals, the common employment creates a relation and privity between the principals, such as will sustain an action for money had and received by one against another to recover moneys belonging to the former paid over by the agent to the latter.⁸

A broker "is strictly a middle-man or intermediate negotiator between the

¹ Id.

² 78 N. C. 289.

³ 26 Mich. 73.

⁴ 36 Mich. 51.

⁵ Supra.

⁶ Helmer v. Krolick, 36 Mich. 371.

⁷ Cottom v. Holliday, 59 Ill. 176. See, also, Bowen v. Johnson, 28 La. Ann. 9.

⁸ Hathaway v. Town of Cincinnati, 62 N. Y. 434.

parties; and for some purposes (as for the purpose of signing a contract within the statute of frauds) he is treated as the agent of both parties."¹ In a subsequent section the same author says: "But, primarily, he is deemed merely the agent of the party by whom he is originally employed; and he becomes the agent of the other party only when the bargain or contract is definitely settled as to its terms between the principals. * * * It would be a fraud in a broker to act for both parties, concealing his agency for one from the other, in a case where he was intrusted by both with a discretion as to buying and selling, and of course where his judgment was relied on."² An agent cannot claim commission upon a transaction which has been entered into in violation of his duties to his principal. The same person cannot act as agent for both seller and purchaser, unless both know of and assent to his undertaking such agency, and receiving commissions from both. Whether such double agency, even with the consent of both principals, is consistent with public policy, is not here decided.³ It is accordingly held that a broker employed to sell land (and the same rule would doubtless apply to sales of personalty) cannot recover compensation from both parties.⁴

The rule is the same where an exchange of property is effected by a broker as where a sale is made.⁵ Nor can an action for the recovery of commissions be maintained in such case against the owner of the property exchanged-for, although by custom or usage among brokers in the place where the exchange was effected, they were entitled, in exchanges of real estate, to a commission from each party of 2½ per cent. in the value of the property exchanged.⁶ Evidence in behalf of the broker to show a custom among brokers to charge a commission to both parties in such cases is inadmissible.⁷ If the broker in such a case exacts from a customer a promise of compensation additional to that promised by the person employing him to sell or exchange before sending the customer to the owner, he cannot recover any compensation from the owner for services, although a sale or exchange is effected with such customer.⁸ The fact that no loss is suffered from such action of the broker does not vary its effect, the transaction being against public policy.⁹ But where each owner, with knowledge that the broker has been employed by both, promises to pay him a commission, such promise may be enforced.¹⁰ And when a middle-man brings together a buyer and seller, each of whom has agreed, without the knowledge of the other, to pay the middle-man a commission on any contract which may be made between them, in the making of which the middle-man takes no part as the agent for either, the conduct of the middle-man in concealing from each his agreement with the other has been held not to be fraudulent, and hence no defense to an action brought by him against either for

¹ Story, Ag. § 28; *Rucker v. Cammeyer*, 1 Esp. 106; *Hinde v. Whitehouse*, 7 East, 558, 569; *Kemble v. Atkins*, 7 Taunt. 260; *Henderson v. Barnewall*, 1 Younge & J. 387; *Beal v. McKiernan*, 6 La. 407; *Hinckley v. Arey*, 27 Me. 362.

² See *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmonds*, 5 Barn. & Ald. 333.

³ *Meyer v. Hanchett*, 39 Wis. 419; *S. C.* 43 Wis. 246.

⁴ *Watkins v. Cousall*, 1 E. D. Smith, 65; *Vanderpoel v. Kearns*, 2 E. D. Smith, 170; *Everhart v. Searle*, 71 Pa. St. 256; *Bennett v. Kidder*, 5 Daly, 512; *Meyer v. Hanchett*, 39 Wis. 419; *S. C.* 43 Wis. 246; *Lloyd v. Colston*, 5 Bush, 587; *Finnerty v. Fritz*, 5 Colo. 174, in which case the rule is laid

down that he is entitled to no commissions from either party.

⁵ *Scribner v. Collar*, 40 Mich. 375; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Farnsworth v. Hemmer*, 1 Allen, 494; *Walker v. Osgood*, 98 Mass. 348; *Raisin v. Clark*, 41 Md. 158; *Meyer v. Hanchett*, 43 Wis. 246; *S. C.* 39 Wis. 419; *Lynch v. Fallon*, 11 R. I. 311; *Rice v. Wood*, 113 Mass. 133. See, also, *Carman v. Beach*, 63 N. Y. 97.

⁶ *Raisin v. Clark*, 41 Md. 158. See, also, *Lynch v. Fallon*, *supra*.

⁷ *Farnsworth v. Hemmer*, 1 Allen, 494.

⁸ *Walker v. Osgood*, 98 Mass. 348.

⁹ *Everhart v. Searle*, 71 Pa. St. 256.

¹⁰ *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rowe v. Stevens*, 53 N. Y. 621; *Alexander v. N. W. C. University*, 57 Ind. 466. See, also, *Meyer v. Hanchett*, *supra*.

the commission agreed upon.¹ In an action against the seller, however, upon such a contract, evidence to prove a usage among brokers as to the time when a commission is to be considered earned, was held inadmissible.² An agreement by a person, desiring to purchase land, to convey a part of it to the seller's broker, cannot be enforced by the broker, if one of the considerations of the agreement was that he would put such person in communication with the seller.³

Tested by the rules above laid down, there can be no doubt of the correctness of the principal case.

M. D. EWELL.

Chicago, June 3, 1885.

¹ Rupp v. Sampson, 16 Gray, 398; Siegel v. Gould, 7 Lans. 177; Mullen v. Keetzleb, 7 Bush, 253. See, also, Redfield v. Tegg, 38 N. Y. 212.

² Rupp v. Sampson, *supra*.

³ Smith v. Townsend, 109 Mass. 500.

In re McVey.

(District Court, D. California. April, 1885.)

COURTS-MARTIAL.—JURISDICTION OF CIVIL COURTS—HABEAS CORPUS.

Within the sphere of their jurisdiction, the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort, and the only authority of the civil courts is to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, they cannot be interfered with, no matter what errors may be committed in the exercise of their lawful jurisdiction.

On Habeas Corpus.

J. H. Dickinson, for petitioner.

Lieut. Col. W. Winthrop, Dep. Judge Adv. Gen., for respondent,
Major A. M. Randol, First artillery.

HOFFMAN, J. The return to the writ shows that the petitioner is a military convict, imprisoned under the sentence of a military court-martial, regularly convened at Fort Vancouver, Washington Territory. The record of the court-martial shows that the petitioner was tried for having deserted on the thirteenth of April, 1877, from an enlistment made March 12, 1877. In his defense, the petitioner pleaded that at the time of his enlistment he was a *deserter*; that in 1875 he had been tried and convicted of a desertion from a previous enlistment; that he had been sentenced to imprisonment and to be dishonorably discharged from service; that he had escaped from custody without receiving a certificate of discharge and had subsequently made the enlistment, for desertion from which he was on trial. He therefore claimed that under section 1118 of the Revised Statutes, which prohibits the enlistment of a "deserter," his enlistment was void, and that he could not be held for the violation of an engagement prohibited by law. The court overruled the plea, and the petitioner was tried, convicted, and sentenced. It is not denied that, within the sphere of their jurisdiction, the judgments and sentences

of courts-martial are as final and conclusive as those of civil tribunals of last resort. *In re Bogart*, 2 Sawy. 402; *Dynes v. Hoover*, 20 How. 82.

The only authority of the civil courts is "to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, we cannot interfere, no matter what errors may be committed in the exercise of their lawful jurisdiction." Per Mr. Justice SAWYER, *In re White*, 9 Sawy. 52; S. C. 17 FED. REP. 723. In the same case it is observed:

"It is not disputed that a military court-martial has general jurisdiction to try a party for the military offense of desertion. * * * This covers the whole ground. Jurisdiction to determine whether the party is guilty of the offense necessarily involves the jurisdiction to determine what constitutes the offense under the statute,—jurisdiction to construe the statute and adjudge what under the statute constitutes a good defense against the prosecution; and to determine whether or not the facts exist which are claimed to constitute a valid defense."

If, as is held by Mr. Justice SAWYER, "jurisdiction to determine whether a party is guilty of the offense necessarily involves the jurisdiction to determine what constitutes the offense," the proceedings of the court-martial in the present case were within its jurisdiction.

I have met with no reported cases where a defense such as now set up has been entertained; still less where the sentence of a court-martial, after disallowance of the plea, has been held void for want of jurisdiction. The defense, however, has heretofore been interposed. In the very valuable digest of opinions of the judge advocate general by Lieut. Col. Winthrop, I find a note of an opinion by the judge advocate general, as follows:

"A deserter who enlists, and afterwards again deserts, cannot, on being brought to trial for the second offense, defend on the ground that his enlistment was void, and that he, therefore, is not amenable to trial. A plea or defense to this effect should not be sustained by the court."

I cite this ruling to show that the defense now relied on has been heretofore set up, and that the question of its validity has apparently been left to the determination of the military tribunal.

It is true that *In re Wall*, 8 FED. REP. 85, Mr. Justice LOWELL declines to decide whether an illegally enlisted minor who openly leaves the service, after formally demanding his discharge, would be guilty of desertion; but he does not intimate that if tried and convicted by a court-martial, its judgment would be wholly void for want of jurisdiction. By the forty-seventh article of war it is provided—

"That any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death," etc.

It would seem that in this article the reception of pay is treated as the equivalent of a due enlistment. In the case at bar, the petitioner was, at the time of his desertion, a *de facto* soldier of the United States. He had voluntarily assumed the obligations, and had at-

tempted to secure the rights, of an enlisted man. To avoid the consequences of his last crime he sets up as a defense that he has committed three previous offenses: (1) A former desertion; (2) an escape from confinement after conviction of that crime, and without waiting for a certificate of dishonorable discharge; (3) a fraudulent re-enlistment in violation of the law and under an assumed name. It was not claimed on the argument that during the time of his actual service he could commit with impunity *any* military offense. It was only contended that he could not commit the offense of desertion. The distinction is not very apparent. It would seem that he must be regarded either as a civilian or a soldier. If the former, he was not amenable to the military law. If the latter, he was subject to that law for any offenses against its provisions. But the claim to immunity from punishment for desertion would even extend to desertion by a sentry from his post, by which the safety of the army might be compromised, or to desertions in time of war in the face of the enemy, and even to desertions to the enemy for the purpose of conveying plans of fortifications or other information obtained in the course of his service.

It may be urged with great force (1) that by the general principles of law a man cannot profit by his own wrong, still less by his crime; (2) that the obvious intent of the statutory provisions prohibiting the enlistment of deserters was to attach an additional penalty for a crime, and not to confer an immunity from the consequences of its repetition; and (3) that the interests and even the necessities of the service forbid the allowance of the defense set up by the petitioner. But this question it is unnecessary, perhaps improper, now to decide; for even if the ruling of the court-martial was erroneous, this court has no jurisdiction to correct the error or to reverse its judgment.

Petitioner remanded.

In re BOSTON & FAIRHAVEN IRON WORKS, Bankrupts.

(Circuit Court, D. Massachusetts. April 30, 1885.)

BANKRUPTCY—CLAIM FOR PROFITS FOR INFRINGEMENT OF PATENT.

A claim for an account of profits against an infringer of a patent-right is not provable against his estate in bankruptcy under Rev. St. § 5067.

Appeal in Bankruptcy.

Browne & Browne, for petitioners.

C. E. Washburn, for defendant.

COLT, J. On March 2, 1878, the Boston & Fairhaven Iron Works filed a petition in bankruptcy in the United States district court of Massachusetts, and were adjudged bankrupts. On the twenty-second

of March, 1880, one Cyril C. Child, of Boston, recovered judgment in the United States circuit court for this district against the bankrupt corporation, for the sum of \$5,640.26, and \$1,773.28, costs of suit, upon a claim for profits from the infringement of a patent. On July 19, 1884, the proof of claim was duly presented before the register, who refused to allow the same, upon the ground that it appeared to be a claim for damages for infringement of a patent-right not converted into a judgment, or otherwise liquidated, prior to the date of bankruptcy. Subsequently, the district court held that the claim was provable against the estate under section 5067 of the Revised Statutes. This ruling was based upon the assumption admitted by counsel that the decree in the patent suit was not for damages but for the profits of the bankrupt corporation, as an infringer of the patent. The present hearing arises on an appeal by the assignees to this ruling of the district court.

A claim for damages for a tort is not a claim provable in bankruptcy, unless liquidated or reduced to judgment prior to the date of proceedings in bankruptcy. *In re Schuchardt*, 15 N. B. R. 161; *Black v. McClelland*, 12 N. B. R. 481; *In re Hennocksburgh*, 7 N. B. R. 37.

A claim for an account of profits against an infringer of a patent-right has been held to be provable in bankruptcy, on the ground that it is not a claim for damages, but is more like an equitable claim for money had and received, for the use of the patentee, the wrong-doer being a trustee of the profits for the patentee. *Watson v. Holliday*, 20 Ch. Div. 780; *Re Blandin*, 1 Low. 543.

But this view has been disapproved by the supreme court in *Root v. Railway Co.* 105 U. S. 189, 214, where, upon careful consideration, it was held that the infringer of a patent-right was not a trustee of the profits derived from his wrong for the patentee; that to hold otherwise would, in effect, extend the jurisdiction of equity to every case of tort where the wrong-doer had realized a pecuniary profit from his wrong. The court decided that a bill in equity for a naked account of profits and damages against an infringer of a patent could not be sustained upon the ground that the infringer was a trustee for the profits. See, also, *Child v. Boston & Fairhaven Iron Works*,¹ recently decided by the supreme court of Massachusetts.

It seems to us that the reasoning of the court in *Root v. Railway Co.* is decisive of the question raised by this appeal. It follows that the claim of Child was not a claim provable against the estate of the bankrupts, and should not be allowed, and that the ruling of the district court should be reversed.

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¹137 Mass. 516

UNITED STATES *v.* SEAMAN.*(Circuit Court, S. D. New York. April 7, 1885.)*

1. FEDERAL ELECTIONS—REV. ST. §§ 5511, 5514—FRAUDULENT ATTEMPT TO VOTE AT ELECTION FOR REPRESENTATIVE IN CONGRESS—INDICTMENT.

An indictment charging a party with a fraudulent attempt to vote in the name of another person at an election for a representative in congress had and conducted under the laws of the state of New York, by which state officers and representatives to congress are voted for on separate ballots, which are deposited in separate ballot-boxes, that fails to allege that such party attempted to vote for a representative in congress, is insufficient.

2. SAME—CONSTRUCTION OF REV. ST. §§ 5511, 5514.

The essence of the crime created by section 5511 of the United States Revised Statutes is an attempt to vote unlawfully for a representative in congress, and not merely an attempt to vote unlawfully at an election at which a representative may be voted for.

On Motion in Arrest of Judgment.

Elihu Root, U. S. Dist. Atty., *Benj. B. Foster*, Asst. U. S. Dist. Atty., and *Charles A. Hess*, for defendant.

WALLACE, J. The defendant was tried and convicted upon an indictment charging him with a fraudulent attempt to vote in the name of another person at an election for a representative in congress had and conducted under the laws of the state of New York on the fourth day of November, 1884. The indictment did not allege that the defendant attempted to vote for a representative in congress. Nor did the evidence upon the trial show such an attempt specifically. State and local officers were voted for at that election. There were seven separate ballots and separate boxes. Under the laws of this state separate ballots are required for representatives in congress from those which contain the names of state officers and local officers. It appeared by the evidence that the defendant presented himself at the polls and handed to one of the inspectors of election a ballot or ballots, when a question arose as to his right to vote by the name which he gave, and he was arrested. At the close of the evidence the counsel for the defendant asked for an instruction that the defendant be acquitted upon several grounds, and among them, because there was no proof that he had attempted to vote for a representative in congress. The court refused to give this instruction to the jury, and instructed them that they were authorized to find the defendant guilty if they were satisfied upon the evidence that he attempted to vote at the election under an assumed name.

The question is now made, upon a motion in arrest of judgment and for a new trial, whether the indictment was sufficient, and whether there was error in the ruling at the trial. The offense for which the defendant was indicted was created by the act of congress of May 31, 1870, commonly known as the enforcement act, and is now found in section 5511, Rev. St., in the chapter relating to crimes against the elective franchise. The section declares:

"If, at an election for representative or delegate in congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living, dead, or fictitious, or votes more than once at the same election for any candidate for the same office, * * * he shall be punished by a fine of not more than \$500, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution."

Section 5514 declares that "whenever the laws of any state require that the name of a person to be voted for as representative in congress shall be contained on any ballot with the names of other persons to be voted for at the same election as state, municipal, or local officers, it shall be deemed sufficient *prima facie* evidence to convict any person charged with voting or offering to vote unlawfully under the provisions of this chapter, to prove that the person so charged cast or offered to cast a ballot wherein the name of such representative might by law be printed or contained." Although the language of section 5511 is sufficiently broad to authorize a conviction when the accused has voted or attempted to vote in the name of another at any election for representative in congress, irrespective of the fact whether he voted or attempted to vote for such representative or not, it ought not to be so construed, even if resort could not be had to section 5514 for interpretation of its meaning. If such a construction were admissible a grave doubt would be suggested whether congress had not transgressed its constitutional power by creating an offense which it is the exclusive province of the state to create and punish.

It is for the several states to determine by their own laws how their own officers shall be elected, who may or may not vote for such officers, and what acts of commission or omission, respecting the exercise of the elective franchise in the election of such officers, shall be criminal. The only restriction upon their power in this behalf is found in that article of the constitution which prohibits the state from denying or abridging the rights of citizens to vote on account of race, color, or previous condition of servitude, and the appropriate legislation of congress to enforce this provision.

The power of congress to intervene by legislation respecting such offenses as the one for which the defendant was tried, is conferred, if it has been conferred at all, by that clause of the constitution which declares that "the times, places, and manner of holding elections for senators and representatives shall be prescribed by each state by the legislature thereof; but the congress may at any time make or alter such regulations, except as to the place of choosing senators." It has been seriously debated whether the power to regulate the "times, places, and manner of holding elections" includes the power to prescribe any regulations or restrictions upon the exercise of the elective franchise by the voters of the states, and whether any interference with the authority of the states to declare who shall vote or shall not vote, and what penalties shall attach to unlawful voting, or for the violation of their own laws concerning elections, is warranted by the power

to regulate the "manner of holding elections." It has been contended that the object of the provision was simply to give to the national government the means to protect itself from being crippled by hostile action of the states in refusing to provide suitable means for holding elections for representatives. The supreme court, however, have decided otherwise in *Ex parte Siebold*, 100 U. S. 371, and *Ex parte Clarke*, Id. 399, where the constitutionality of some of the provisions of the enforcement act were vindicated. It was there held that congress, in the exercise of its lawful authority, could make the violation of state laws for securing the purity of elections by state officers a federal crime; but the court was careful to confine its opinion to the constitutional validity of such legislation when it was legitimately exercised to regulate elections for representatives in congress; and Mr. Justice BRADLEY, speaking for the court in *Ex parte Siebold*, used the following language:

"In what we have said it must be remembered that we are dealing only with the subject of elections of representatives to congress. If, for its own convenience, a state sees fit to elect state and county officers at the same time, and in conjunction with the election of representatives, congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction; nor do we understand that the enactments of congress now under consideration have any application to such acts."

No act of congress should be interpreted, unless the language used admits of no other interpretation, to press beyond the certain confines of constitutional power, (*U. S. v. Coombs*, 12 Pet. 72;) and especially should this rule be observed in the interpretation of a criminal statute relating to offenses upon the border line of the national jurisdiction. Such, clearly, would be the character of the statute in question if it explicitly made it a crime to vote or attempt to vote under an assumed name for a state or county officer at any election for a representative in congress. Such a statute would not only be of doubtful constitutionality, but no doubt is entertained that it would be plainly unconstitutional, unless the act made criminal could in some way affect the election of a representative, as it might in those states where ballots for the state or local officers contain also the name of the candidate for representative.

Aside from these general considerations, a clear exposition of the meaning of the section is furnished by section 5514. That section can have no application if it is unnecessary to prove, upon the trial of an indictment under section 5511, that the accused voted or attempted to vote for a representative in congress. It demonstrates the intention of congress to legislate only to the extent required to secure an honest and unvitiated election of representatives, and in this behalf not to make any act penal which does not necessarily militate against this object.

Reading both sections together it seems plain that the essence of the crime created by section 5511 is an attempt to vote unlawfully for a representative in congress, not an attempt to vote unlawfully at an election at which a representative may be voted for. The indictment should therefore have charged that such an attempt was made by the defendant.

As there was no such averment, the defendant was improperly convicted.

BENEDICT, J. I am of the opinion that the defendant is entitled to a new trial, for the reason that at the trial it was conceded by the district attorney that the indictment did not aver an attempt to vote for representative in congress. The charge to the jury, to which no exception was taken, shows that the case was tried upon this understanding. If it had been submitted to the jury to say whether the evidence satisfied them that the accused attempted to vote for representative in congress, and the jury upon such a charge had found the accused guilty, I incline to think the indictment sufficient after verdict to authorize judgment. The imperfect averment of the indictment would have been cured by such a verdict. But the verdict, taken in connection with the charge, renders it plain that the jury did not by their verdict necessarily find the accused guilty of having attempted to vote for a representative in congress. The absence of such a finding entitles the accused to a new trial.

BROWN, J. The defendant, in my judgment, could not be lawfully convicted unless the jury found that he attempted to vote for a representative in congress. Upon the evidence and proper instructions, the jury might possibly have found that he did attempt to vote for a representative in congress. Had they been instructed they must find such an attempt or acquit the defendant, the imperfect averment in the indictment would, I am inclined to think, have been cured by a general verdict of guilty. But the instructions given, and the disclaimer by the district attorney at the close of the trial, in effect completely withdrew this question from consideration of the jury. The verdict of guilty does not, therefore, import a finding that the defendant attempted to vote for a representative in congress; and upon this ground alone, and without expressing any opinion on the other topics considered in the opinion of the circuit judge, I think a new trial should be ordered.

PARKER, Trustee; v. MONTPELIER CARRIAGE CO.

(Circuit Court, D. Vermont. May 19, 1885.)

PATENTS FOR INVENTIONS—BABY-CARRIAGE TOP—INFRINGEMENT.

Re-issued patent No. 10,363, granted August 7, 1883, to Horatio G. Parker, trustee, for an improved baby-carriage top, held valid, and infringed by the device used by defendant; following *Parker v. Stow*, 23 FED. REP. 253.

In Equity.

William C. Strawbridge, for plaintiff.

Hiram A. Huse, for defendant.

WHEELER, J. This cause has been heard on a motion for a preliminary injunction to restrain an alleged infringement of reissued letters patent No. 10,363, granted August 7, 1883, to the plaintiff for an improvement in children's carriages. The same patent with another which expired February 11, 1885, was before the circuit court for the district of Massachusetts, upon a former reissue, in *Richardson v. Noyes*, 10 O. G. 507, S. C. 2 Bann. & A. 398; and in its present form was before the circuit court for the district of Connecticut in *Parker v. Stow*, 23 FED. REP. 252. In the former case the plaintiff obtained a decree principally, apparently, upon the patent which has now expired; the court remarking (LOWELL, J.) that Richardson's patent, which was the one now in question, "must be restricted to the particular devices there specially described." The defendant relies upon this remark, and claims that the patent so restricted would not cover the alleged infringement, which is precisely the same as that adjudged to be an infringement in *Parker v. Stow*. The case of *Richardson v. Noyes* does not appear to have been before the court in *Parker v. Stow*; but if it had been, there is not so much discrepancy between them as to make it probable that the decision in the latter case would have been any different. The patent in the latter case appears to have been held valid for the particular devices for changing the position of the top of the carriage relatively to the child's head, rather than for a broad invention of a movable top for such a carriage. The devices of that defendant and this, vary from those particularly described in the patent only in the mode of fastening in position and in the place of the joint, and in each of these respects each appears to be an equivalent of the other, as appears to have been held in that case. The authority of that case is not weakened by the other case, and as it covers this case, both as to validity of the patent and infringement, the plaintiff appears to be entitled to a preliminary injunction as prayed for.

Motion granted.

SCHEIDLER v. TUSTIN and others.

(Circuit Court, W. D. Pennsylvania. May 13, 1885.)

1. PATENTS FOR INVENTIONS—NOVELTY.

There is nothing patentable in the application to a horizontal steam-engine and boiler of old devices in the precise combinations in which they had previously existed in steam-engines with vertical boilers, the result obtained being the same in character with the original result.

2. SAME—PATENT No. 269,329.

Letters patent No. 269,329, granted December 19, 1882, to Reinhard Scheidler, relating to a combined bed-plate and heater for portable steam-engines with horizontal boilers, *held* to be invalid for want of novelty.

In Equity.

M. D. & L. L. Leggett, for complainant.

Bakewell & Kerr, for respondents.

ACHESON, J. The bill charges the defendants with the infringement of letters patent No. 269,329, granted to the complainant December 19, 1882, upon an application filed October 7, 1882. The complainant's invention relates to a combined bed-plate and heater for portable steam-engines with horizontal boilers. It is formed hollow, and contains pipes through which the feed-water is supplied to the boiler, and is nearly triangular in cross-section, the top and outer sides being in planes at right angles to each other, while the under or hypotenuse side is made concave or concentric with the shell of the boiler to "fit closely" thereto. The bracket or pillow-block, which supports the main shaft of the engine, is cast in a single piece with the heater, and is vertically divided through the center of the bearing-box; the cap being secured to the pillow-block by horizontal bolts, and being supported at the lower end by a seat formed on the top of the heater.

The patent has four claims, each purporting to be for a combination of devices. The first claim is as follows:

"(1) In combination with a horizontal boiler for portable steam-engines, a combined bed-plate and heater, the pillow-block or support for the bearing of the main shaft of which is cast in a single piece therewith, and having a vertical division through the center of the box-opening, substantially as set forth."

The second claim is the same as the first, with the addition, as part of the combination, of the bolts which secure the cap to the pillow-block, "extending horizontally into or through the same." The third claim reads thus:

"(3) In combination with a horizontal boiler for portable steam-engines, a combined bed-plate and heater, extending lengthwise and secured to said boiler, of triangular or nearly triangular cross-section, having the side thereof contacting with the boiler-shell, curved or concentric therewith, to allow it to lie with its surface on the boiler throughout its whole extent, whereby all the heat possible may be conducted from the boiler to the heater, in addition

to that produced from the exhaust steam, as and for the purpose hereinbefore set forth."

The fourth claim covers the seat for the support of the cap in combination with "a combined bed-plate and heater for portable steam-engines, having its pillow-block cast integral therewith, as described."

The engine which is alleged to infringe this patent was built by John H. McNamar, a manufacturer of engines, etc., at Newark, Ohio, in the summer of 1882, and was by him sold and delivered to one of the defendants on or about the first of August of the same year. This engine, it is admitted, embodies the devices and combinations covered by the first two claims of the patent, but infringement of the other claims is denied. Whether or not there is infringement in fact of the third claim depends upon the proper construction thereof. It calls for a combined bed-plate and heater, having the concave side thereof "*contacting with*" the boiler shell, curved or concentric therewith, "to allow it to lie with its surface on the boiler throughout its whole extent." In the same connection the specification uses the terms "to fit closely." It also mentions a disadvantage from "buckling," often resulting "when a space is left between the heater and the boiler;" and one of the objects of the invention is declared to be, "by bolting the bed-plate and heater with its curved and most widely extended side in *direct contact* with the boiler and fire-box, to obtain therefrom all the heat possible." Now the prior state of the art, undoubtedly, was such that this claim must be confined within very strict limits, and hence the defendants with much reason contend that it must be held to exclude any sensible intervening space between the curved side of the bed-plate and the boiler-shell. Thus construed, the defendant's engine does not infringe, for therein the combined bed-plate and heater and the boiler-shell do not touch each other, but are separated by a clearly perceptible space, open, and, according to expert testimony, in extent sufficient materially to interfere with the transmission of heat from the boiler to the heater. The agreed distances, indeed, between the hypotenuse side of the bed-plate and the sheets of the boiler-shell are but one-half of an inch and forty-one sixty-fourths of an inch, and between the same side of the bed-plate and the top of the rivet heads, one quarter of an inch and nine sixty-fourths of an inch. These distances do strike one as unimportant, and they ought, perhaps, to be so held. At any rate, in the further consideration of this case, it will be treated upon the theory that if the third claim is valid, infringement thereof is shown.

Touching the fourth claim of the patent, I need only say that, discarding any doubt arising upon the evidence as to whether the cap of the defendant's pillow-block is seated upon the heater, I will assume the fact of infringement.

This brings us to a consideration of the merits of the patent, and at the outset it must be said that the patent is extremely narrow at

the best. All the claims—the first three in express terms and the fourth by implication—are limited to portable steam-engines having horizontal boilers. Hence, all the combinations are open to free public use when applied to vertical boilers. Now, it is well known and in proof that portable steam-engines with vertical and horizontal boilers have long been in common use for the same general purposes. Again, under the evidence it is, beyond disputation, clear that all the devices entering as elements into the several combinations were old at the date of the alleged invention. They had all been previously used on portable steam-engines. The specification here admits that a combined bed-plate and heater for steam-engines was not new, and that the method of heating it by exhaust steam was also old. But the uncontradicted evidence goes far beyond this admission, and conclusively establishes that long prior to the alleged invention portable steam-engines with horizontal boilers were provided with combined bed-plates and heaters, laid lengthwise upon the boiler and closely fitted thereto, of various shapes, in cross-section,—oval, rectangular, triangular, etc.,—the pillow-block being sometimes bolted to the heater and sometimes cast integral therewith. Now, if the evidence stopped right there, it might well be doubted whether, in the undeniable prior state of the art, the complainant's patent discloses anything more than the exercise of mere mechanical skill. *Atlantic Works v. Brady*, 107 U. S. 192; S. C. 2 Sup. Ct. Rep. 225; *Phillips v. City of Detroit*, 111 U. S. 604; S. C. 4 Sup. Ct. Rep. 580.

But the defendants have furnished specific proofs of anticipation, and they are unusually full. And, first, let us take an instance of a vertical engine. Such engines were built as early as 1877, and since, by C. Aultman & Co., of Canton, Ohio. The proofs in respect thereto are complete, and include as an exhibit the bed-plate and heater taken from one of these engines which was sold in 1879. The Aultman was a portable steam-engine with a vertical boiler, and it had a combined bed-plate and heater, of triangular shape in cross-section, placed lengthwise upon the boiler and fitted closely thereto. The side of the bed-plate next the boiler was concentric therewith. The pillow-block was cast in a single piece with the bed-plate and heater, and it was divided through the center of the box-opening at right angles to the length of the heater, and the cap was secured to the pillow-block by bolts extending longitudinally. The above-mentioned exhibit also shows a lip overlapping the outer end of the cap of the pillow-block, and a bearing for the inner end of the cap formed by the projecting end of the bed-plate. This identical form of combined bed-plate and heater is capable of use on horizontal boilers, and, in fact, C. Aultman & Co. have recently so applied it. True, some of the complainant's witnesses state that to make it safe and practicable for a horizontal boiler the bottom-rest for the cap should be increased; but if this be conceded, the object could be effected by the mere elongation or extension of the bed-plate,—a change within the grasp of the lowest

grade of mechanical skill. At the utmost, then, all that the complainant did was to apply to a horizontal engine and boiler old devices in the precise combinations in which they had previously existed in engines with vertical boilers; the result obtained by the new application being the same in character as the original result. That therein there was nothing patentable, may be confidently affirmed upon the authority of the cases of *Pennsylvania R. Co. v. Locomotive Truck Co.* 110 U. S. 490; S. C. 4 Sup. Ct. Rep. 220; and *Blake v. City and County of San Francisco*, 31 O. G. 380; S. C. 5 Sup. Ct. Rep. 692.

But the evidence is convincing that the complainant was not, in fact, the first to apply these devices and combinations to horizontal boilers. For example, it appears that portable steam-engines with horizontal boilers, manufactured and sold by George B. Stevenson between the years 1873 and 1880, had the pillow-block cast in one piece with the combined bed-plate and heater, with a vertical division through the box-opening, and with a seat for supporting the lower end of the cap of the pillow-block, to prevent downward movement; the bolts which secured the cap to the box running horizontally, or in a line with the bed-plate. By indisputable evidence it is shown that the Stevenson engine embodied all that is embraced in the first, second, and fourth claims of the complainant's patent. Furthermore, in that engine the combined bed-plate and heater was laid lengthwise upon the boiler in close proximity therewith, and the proof is quite satisfactory that in several instances, at least, prior to 1830, it was triangular in cross-section.

Again, the Thomas engine, a portable steam-engine with a horizontal boiler which was manufactured and sold as early as 1876, deserves special mention. It had a combined bed-plate and heater extending lengthwise on the boiler and bolted thereto, of nearly triangular shape in cross-section, and the side thereof next the boiler was curved or concentric therewith. The bed-plate was fitted originally close to the boiler, but, as afterwards made, was bolted about a quarter or three-eighths of an inch from the boiler. This engine had the pillow-block bolted to the heater and divided horizontally, but it completely anticipated the third claim of the patent, especially as that claim has been construed for the purposes of this case.

There is much other evidence of prior knowledge and use, but it would subserve no good end to extend this opinion by a particular reference thereto. Suffice it to say that in my judgment the defense of want of novelty is fully made out. And, having reached this conclusion, I deem it unnecessary to consider the further defense that has been insisted on, resting on the alleged invalidity of the patent on the ground, as is claimed, that it is for mere aggregations of old devices.

Let a decree be drawn dismissing the complainant's bill, with costs.

VACUUM OIL CO. v. BUFFALO LUBRICATING OIL CO.

(Circuit Court, N. D. New York. March 20, 1885.)

1. PATENTS FOR INVENTIONS—NOVELTY—PATENT No. 68,426.

Claims 2 and 12 of patent No. 68,426 granted to Hiram B. Everest, on September 3, 1867, for an improvement in apparatus for distilling petroleum, *held void for want of novelty.*

2. SAME—DISCLAIMER.

After the term of a patent has expired, it is too late to file a disclaimer.

In Equity.

WALLACE, J. For the reasons stated orally at the hearing of this cause the second and twelfth claims of the patent in suit (No. 68,426, granted September 3, 1867, to Hiram B. Everest, assigned to complainant) are clearly void for want of novelty. Inasmuch as no disclaimer has been filed, it is unnecessary to consider the validity of the other claims. After the term of a patent has expired it is too late to file a disclaimer. The suit cannot therefore be maintained, and the bill is dismissed.

GAGE v. KELLOGG and another.

(Circuit Court, N. D. New York. May 29, 1885.)

1. PATENTS FOR INVENTIONS—CLAIM FOR MACHINE AND PROCESS FOR USING IT.

There cannot be in the same patent a claim for a machine and a claim for the process of using that machine.

2. SAME—REISSUE VOID—ENLARGEMENT OF CLAIMS.

Reissued letters patent No. 8,615, dated March 1, 1879, and granted to William B. Fisher for an improvement in seed-steaming apparatus, expand the claims in the original patent, and are void.

3. SAME—INFRINGEMENT.

Reissue No. 8,615 compared with defendants' machine which is used to moisten meal, and not to dry or clean the seed for storage or shipping, and *held not infringed.*

John Dane, Jr., for complainant.

John W. Munday, for defendants.

COXE, J. The complainant, as assignee, seeks by bill in equity to restrain the infringement of reissued letters patent No. 8,615, dated March 11, 1879, and granted to William B. Fisher for an "Improvement in methods and apparatus for treating seeds." The application for the reissue was filed February 19, 1878. The original patent, No. 129,018, is dated July 16, 1872, and is for an "Improvement in seed-steaming apparatus." The defendants contend, among other defenses, that the reissue is void, its claims having been expanded after a delay of five years and seven months. The claims

are placed below side by side. The italics in each show the matter not found in the other.

Original.

1. The combination of the hopper, *H*, perforated conical steam-coil, *B*, jacket, *O*, shaft, *D*, and rotating arms, *C C*, carrying scrapers, *E E*, constituting an improved apparatus for treating oily seeds, as and for the purpose herein set forth.

2. The improved method of cleaning and drying oleaginous seed by feeding the same over the inclined surface of a perforated conical steam-coil, substantially in the manner described.

Reissue.

1. The herein described method of treating seed, consisting in allowing it to flow downward around a central perforated steam reservoir, and forcing jets of steam from said reservoir outward through the mass of seed, the flow of said seed being regulated by stirrers, substantially as set forth.

2. The combination, with a seed receptacle provided with a perforated steaming device, arranged within or below the material operated upon, of devices for stirring its contents at will, said devices operating upon a platform, substantially as and for the purposes set forth.

3. In combination with a seed receptacle for holding the seed while being steamed, means for directing the steam into said seed, and horizontally rotating stirrers adapted to regulate the flow of said seed, substantially as set forth.

4. An apparatus for treating oleaginous seed by steam, consisting of a receptacle adapted to receive and retain the seed at will, a steaming device adapted to be surrounded by said seed and eject steam in different directions outwardly from within the mass, and rotating stirrers, substantially as described, whereby said seed may be thoroughly permeated by said steam, substantially as and for the purposes set forth.

The first claim of the original, which is for the apparatus, contains the following elements: *First*, the "hopper;" *second*, the "perforated conical steam-coil;" *third*, the "jacket;" *fourth*, the "shaft;" *fifth*, the "rotating arms;" *sixth*, the "scrapers;" and, *seventh*, (construing the patent liberally,) the "bed," "base," or "table." For this claim the reissue substitutes three indefinite and nebulous claims,—the second, third, and fourth,—each enlarging and expanding the scope of the original. In the second claim the "hopper," "perforated conical steam-coil," "jacket," "rotating arms," "scrapers," and "table" are all discarded, and in their places appear "a perforated steaming device," "a seed receptacle," and "devices for stirring its contents at will, said devices operating upon a platform." It will be observed that as these devices stir the contents of the seed receptacle they must necessarily

be so located that they can perform this function. In the drawing they are placed outside of and below the hopper. In the original they are not described as doing the work of stirrers.

The third claim is even more sweeping in its terms. It deals with a combination having three elements: A "seed receptacle for holding the seed while being steamed," "means for directing the steam into said seed," and "horizontally rotating stirrers adapted to regulate the flow of said seed."

The fourth claim is hardly less ambiguous. It is for a "receptacle adapted to receive and retain the seed at will;" "a steaming device, adapted to be surrounded by said seed, and eject steam in different directions, outwardly, from within the mass;" and "rotating stirrers."

In the so-called "process claim" the method of "cleaning and drying oleaginous seed" becomes in the reissue a method of "treating seed." A manufacturer, therefore, who, like the defendants, is engaged in moistening linseed meal for the press is as much within this claim as one engaged in drying or cleaning.

The only attempt, either in the testimony or the brief, to defend the patent from the attack based upon the expansion of the claims, has reference to this first claim of the reissue. The attention of the complainant's expert witness was called to it, and he expressed the opinion that it is not broader, but narrower, than the original, for the reason that it is limited by the use of the words, "the flow of said seed being regulated by stirrers." His silence with reference to the other claims is suggestive. Even if this theory of the witness were correct, it would still be for a different invention. But is it correct? The patentee himself evidently understands that this claim is only for the process of treating seed by the apparatus, and the whole thereof, described in the patent. He says:

"I do not wish to be understood as claiming, broadly, the art of treating seed by steam; neither do I wish to be understood as claiming, broadly, all mechanism with which steam may be used for treating oleaginous seed, irrespective of the construction, arrangement, and operation of the same, as I am aware that steam has been employed heretofore for the purpose of treating seed."

In the original and in the reissue he seeks to secure the method of using the apparatus described in each respectively. The difficulty is that in the original the description is narrow and specific, in the reissue it is broad and general.

It is quite evident that no one would infringe the original who did not use a perforated conical steam-coil, or its equivalent, which, in the description, the drawing, and the claims, is made an element, and an essential element, of the invention. It is equally clear that when the inventor, in the reissue, speaks, for instance, of "means for directing steam into said seed," he uses language broader and more generic in its scope and meaning than is used in the original. A mechanism might infringe the claims of the reissue, and be entirely

outside of the claims of the original. For a "perforated steaming device," "a central perforated steam reservoir," etc., many equivalents suggest themselves, which would not occupy such a relation to a "steam-coil." In short, for the apt terms and perspicuous statement contained both in the description and the claims of the original patent, obscure and general language has been substituted. In no case has a word of a more limited meaning been employed, but in almost every instance the reverse is true. In studying the reissue the conviction is forced upon the mind that the inventor had before him his own and other machines, when drawing its specification, and that he endeavored to cover them all by an ingenious and clever use of words. Had the decision in *Miller v. Brass Co.* 104 U. S. 350, been announced at that time it is safe to assume that so venturesome an undertaking would not have been attempted. The language of *Coon v. Wilson*, 30 O. G. 889, S. C. 5 Sup. Ct. Rep. 537, is applicable. The court say:

"In the present case, there was no mistake in the wording of the claim of the original patent. The description warranted no other claim. It did not warrant any claim covering bands not short or sectional. The description had to be changed in the reissue, to warrant the new claims in the reissue. The description in the reissue is not a more clear and satisfactory statement of what is described in the original patent, but is a description of a different thing, so ingeniously worded as to cover collars with continuous long bands, and which have no short or sectional bands."

The conclusion is therefore reached that the reissue is void under the doctrine so often announced by the supreme court, and which has been reaffirmed as lately as May 4, 1885, in *Wollensak v. Reiher*, 5 Sup. Ct. Rep. 1132.

But irrespective of these considerations the inquiry is suggested, with reference to the first claim of the reissue, can there be in the same patent a claim for a machine and a claim for the process of using that machine? I have reached the conclusion that there cannot be, with some hesitation, for the reason that the question has not been argued by counsel, and yet I am unable to understand how the complainant can avoid the rule enunciated in the following cases: *MacKay v. Jackman*, 12 FED. REP. 615; *Brainard v. Cramme*, Id. 621; *Goss v. Cameron*, 14 FED. REP. 576; *Hatch v. Moffitt*, 15 FED. REP. 252; *New v. Warren*, 22 O. G. 587; *Corning v. Burden*, 15 How. 252.

But, in any view, the defendants do not infringe. Their machine is used to moisten meal, not to dry or clean the seed for storage or shipping. It is doubtful whether the apparatus described in the complainant's patent could be used at all with moistened linseed meal. The experiment has not been tried, as no machine precisely like the patented apparatus was ever built or operated, and the testimony seems, practically, to be unanimous that the meal would clog in the space between the jacket and the coil, and soon cease to flow. The defendants have no conical steam-coil or central reservoir. There is no flowing down of the seed around a perforated steam reservoir while being sub-

jected to the action of the steam. There are no adjustable stirrers, performing the functions of complainant's stirrers, and the flow is not regulated by their action. Nor can it be said, remembering that an equivalent must perform the same function in substantially the same manner, that for these elements mechanical equivalents are used.

Take, for illustration, the lower part of the seed receptacle. In the description the inventor states as follows:

"The lower part of the seed receptacle, (represented at O,) adapted for partially confining the seed and steam, when the softening and moistening process is required for pressing or other purposes, may be removed, and a perforated or screen-jacket substituted in lieu thereof. By the employment of the latter the steam may be forced directly through the moving seed and screen-jacket, in such a manner as to cleanse it, and remove and carry away all impurities and excess of moisture previously contained therein."

It is said that for this the steam-jacket of the defendants (the sides of their tub or kettle are made double and filled with steam) is an equivalent; but the defendants' jacket does not perform the same functions as the jacket O. Certainly it does not perform them in substantially the same way. If a curb were placed around complainant's table the defendants' jacket would, perhaps, be an equivalent for such curb.

For these reasons it follows that the bill must be dismissed.

TOMKINSON v. WILLETS MANUF'G Co.

(Circuit Court, S. D. New York. March 7, 1884.)

1. PATENTS FOR INVENTIONS—DECREE BY CONSENT—RES JUDICATA.

When a decree has been entered by consent in a prior suit declaring a patent valid, and that complainant is the sole owner thereof, such decree will be considered binding, as to all questions determined thereby, in a second suit between the same parties.

2. SAME—DESIGN PATENTS—INFRINGEMENT—RESEMBLANCE.

It is not necessary that a design patent should be copied in every particular to constitute an infringement. It is sufficient if the resemblance is such that an ordinary purchaser would be deceived, although the infringer has deviated slightly in details, or has omitted something which an expert could discover.

In Equity.

Frank v. Briesen, for complainant.

Philo Chase, for defendant.

COXE, J. This is an equity action for infringement founded upon design patent No. 13,295, granted to John Slater, assignor to Gildea & Walker, September 12, 1882, for a design for a vegetable dish. The patent is now owned by the complainant. The invention relates to a new shape or configuration for a vegetable dish or other similar household article of china. The claims are as follows:

(1) The design for a rectangular vegetable dish, having upper straight section, *c*, central curved section, *d*, and lower straight section, *e*, substantially as shown. (2) The design for a rectangular vegetable dish, having straight top and a section, *d*, curved first outward and then inward in such manner that the base of the dish is smaller than its top, substantially as shown. (3) The design for a vegetable dish, having parallel sides, *a*, *a'*, and parallel sides *b*, *b'*, and composed of the sections, *c*, *d*, *e*, substantially as shown.

It will be observed that as to the handles, ornamentation, size, and color of the dish, nothing is said in the claims. They are for the shape only.

In June, 1883, prior to this suit, the complainant commenced an action in the United States circuit court, district of New Jersey, against the defendant for an infringement of this patent. The complaint was in all respects similar to the one in the present suit. The defendant appeared by its president and consented to a decree and an injunction as prayed for. On or about the twenty-first of July, 1883, a final decree was entered, by which it was determined that the complainant is the sole owner of the letters patent in suit, and that they are good and valid in law. That decree was pleaded and proved in this action; it is valid and binding upon the rights of the parties, and, as to all the questions determined by it, is *res judicata*. Unfortunately, perhaps, for the defendant, the court is not now permitted to consider the defenses, which, by the defendant's own action, are thus eliminated from the case. The question of infringement is alone open to investigation.

In approaching this subject, the rule with reference to design patents should be kept steadily in view. It is by no means necessary that the patented thing should be copied in every particular. If the infringing design has the same general appearance, if the variations are slight, if to the eye of an ordinary person the two are substantially similar, it is enough. It is of no consequence that persons skilled in the art are able to detect differences. Those who have devoted time and study to the subject, who have spent their lives in dealing in articles similar to those in controversy, may see at a glance features which are wholly unimportant, and unobserved by those whose pursuits are in other directions, and who are attracted only by general appearances. If the resemblance is such that a purchaser would be deceived, it will not aid the infringer to show that he has deviated slightly from a straight line in one place and from a curved line in another, or that he has added or omitted something which an expert can discover. *Gorham Co. v. White*, 14 Wall. 511; *Lehnbeuter v. Holt-haus*, 105 U. S. 94; *Wood v. Dolby*, 19 Blatchf. 214; S. C. 7 Fed. Rep. 475; Sim. Pat. 218; Walk. Pat. § 375. Tested by this rule, I am constrained to say that the defendant infringes.

The principal difference pointed out between the two dishes in controversy is that in the upper vertical section of defendant's dish the sides are not exactly parallel, but bulge outwardly, departing from a straight line something less than half an inch. It is thought, how-

ever, that this divergence is not sufficiently marked to arrest the attention of the average observer. Bearing in mind that the patent deals with shape alone, the same conclusion must be reached with reference to the other differences suggested by the defendant's witnesses.

There should be a decree for the complainant.

RICHARDSON v. BRESNAHAN and others.

(Circuit Court, D. Massachusetts. May 15, 1885.)

PATENTS FOR INVENTIONS—INFRINGEMENT—FOURTH CLAIM OF PATENT No. 101,931.

The fourth claim of patent No. 101,931, dated April 12, 1870, granted to N. J. Simonds for a leather-cutting press for shoe stocks, construed, and *held* not infringed by defendants in the use of a revolving block and cutting-die, without the cutting-press described in the specifications and drawings of the Simonds patent.

In Equity.

W. A. Macleod, for complainant.

C. A. Taber, for defendants.

COLT, J. This suit is brought upon letters patent, No. 101,931, dated April 12, 1870, granted to N. J. Simonds, for a leather-cutting press. The complainant derives title to the patent by assignment. The invention relates to certain improvements in cutting-presses, used for cutting shoe stock, and consists, among other things, in so constructing the press that the cutting-block, as it recedes from the die, will vibrate or swing, and thus expose the cutting-die; also, in imparting to the cutting-block a rotary motion relative to the cutting-die, whereby, in cutting, a change of contact of the surface of the block is constantly produced, and a smoothness of face preserved under the continued cuts of the die. The defendants are charged with infringing the fourth claim of the patent, which is as follows: "The revolving cutting-block, P, in combination with the cutting-press, substantially as and for the purpose specified." The defendants use a revolving block and cutting-die, but they do not use the cutting-press described in the specification and drawings of the patent. At the outset, therefore, the question arises as to the proper construction of claim 4. Does it cover the combination of a revolving block and cutting-die, or is it limited to the combination of a revolving block and the cutting-press set out in the patent? The claim says a revolving block in combination with *the* cutting-press. The cutting-press refers to the mechanism set out and described in the patent. It not only includes the cutting-die, but the other mechanism involved in the machine, and elaborately set forth in the specification. There is nothing to be found in the patent which shows that the words cut-

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ting-press are synonymous with cutting-die; on the contrary, when the term is used elsewhere in the patent, it plainly refers to the entire mechanism of the machine. The natural meaning of the words, as well as the sense in which they are used in the patent, forbid the construction contended for by the complainant. It would be a forced and unwarranted construction to say that cutting-press means cutting-die, and by this means make the claim cover all leather-cutting machines in which we find a die and a revolving cutting-block. And, in view of the prior state of the art, we think the broad claim of a revolving cutting-block, in combination with a die, would be void for want of novelty. Simonds was not the first inventor of a revolving cutting-block; and we find a revolving cutting-block in combination with a die in the leather cutting-machine made by S. D. Tripp as early as 1868 and 1869, and a revolving cutting-block operated upon with knives in prior machines for cutting meat. It was necessary, therefore, for Simonds to limit his claim, in order that it might be valid, to the specific mechanism described in his patent. The defendants not using such mechanism, there can be no infringement, and the bill must be dismissed.

Bill dismissed.

JENKINS and others v. GURNEY.

(Circuit Court, D. Massachusetts. May 11, 1885.)

PATENTS FOR INVENTIONS—HYSLOP MACHINE FOR MAKING SHOE-SHANKS—INFRINGEMENT.

Patent No. 159,577, dated February 9, 1875, granted to John Hyslop, for an improvement in machines for making shoe-shanks, *held* valid, and infringed by defendant's machine, having a forming die, flanged table, and vibrating arms.

In Equity.

C. H. Drew and C. F. Perkins, for complainants.

P. E. Tucker and C. H. Swan, for defendant.

COLT, J. This suit is brought upon letters patent, numbered 159,577, dated February 9, 1875, granted to John Hyslop, Jr., assignor to the complainants, for an improvement in machines for making shoe-shanks. The invention relates to a device for packing shoe-shanks upon a table after leaving the cutting and forming dies, by which means the labor is saved of packing by hand. The same patentee is the inventor of a machine for cutting, punching, and bending metal shoe-shanks, for which a patent, No. 129,347, was issued July 16, 1872. The patent in suit was intended as an attachment to this machine. This appears from the drawings, specification, and evidence. The claim of the patent is as follows:

"As an improvement in machines for cutting and bending metallic shoe-shanks, the combination, with the forming die, E, of flanged table, F, and vibrating arms, H, fastened to a shaft, I, oscillated by mechanism, substantially as described, as and for the purposes set forth."

The objection is urged that the claim of the patent does not describe an operative device. The claim is for a packing device in combination with a forming die, in a machine for cutting and bending shoe-shanks, and taken in connection with the prior machine, it is plainly operative and useful. The description of the prior machine in the patent being sufficiently clear and specific, it became unnecessary to make the movable former, D, which comes forward and presses against the forming die, E, or the other elements of the prior machine, parts of the combination claimed in the patent. *Loom Co. v. Higgins*, 105 U. S. 580. But, in view of the prior state of the art, it is contended that the patent is void for want of novelty, and we are referred to several patents as anticipating the Hyslop invention.

The Kellogg patent, for printing-presses, dated January 6, 1863, shows a "fly" which receives the printed work as it passes from the press, and deposits the sheets, one by one, in a box. It can hardly be said, we think, that the "fly" of a printing-machine anticipates the Hyslop device. The mechanism may be somewhat similar, but the mode of operation is different. Nor does the Kellogg patent contain the same combination of elements as the patent in suit.

The Weymouth patent, dated September 25, 1866, for making envelopes, has a device for slightly compressing the envelopes as they fall from the machine. It is difficult to understand from the drawings precisely the operation performed by what is termed the "follower." It is evident the device would not work in a machine for making shoe-shanks. Certain parts of Weymouth pressing device are absent from Hyslop's machine. If we regard the claim of the patent as a combination of a forming die with a packing device, the Weymouth patent presents no such combination.

As for the Baird patent, granted June 8, 1869, for an improvement in receiving and conveying blanks from printing-presses, it is manifest that the mechanism is quite different from the Hyslop device. The Briner patent, No. 159,559, for forming spring shanks for shoes, is dated the same day as the patent in suit; but we think the evidence goes to establish the fact that the Hyslop invention was prior in point of time. It is therefore unnecessary to discuss the question of anticipation. So far as Briner undertakes to prove the use of a packing device similar to Hyslop's, for a period of six years prior to the date of his patent, we cannot but conclude from his whole testimony that he has failed to establish such use with anything like the clearness and certainty that is necessary.

Upon the question of infringement we entertain no doubt. The defendant's machine has a forming die, flanged table, and vibrating arms. The fact that the blanks are cut before use in defendant's

machine can make no difference. The patent in suit is not for any cutting mechanism. The invention is simply a forming die, which bends the shank so that it will stand on its edge in combination with the packing device. The end attained in both machines is the same, and the mechanism is substantially the same, or the equivalent. In the patent in suit the blank falls to the table by the action of gravity, after being operated upon by the forming dies. In the defendant's machine the working faces of the forming dies are horizontal, so that gravity cannot take the shank from the forming dies. Means are therefore provided to push the shank from the dies; and, as it is necessary for the shank to be on its edge, the forward end of the table is so shaped that in pushing the blank forward it will turn from a flat to an edgewise position. The devices are in substance the same, and the differences of construction are insufficient, in our opinion, to relieve the defendant from the charge of infringement. Though the invention of Hyslop is limited in its scope, we think it fairly patentable. He was the first to attach a packing device to a machine for making shoe-shanks.

Let a decree be entered for the complainants, for an injunction and account, as prayed for in their bill.

Decree for complainants.

THE E. B. WARD, Jr.¹

CARLSDOTTER and others v. THE E. B. WARD, Jr.¹

(Circuit Court, E. D. Louisiana. March 27, 1885.)

COLLISION—DAMAGES FOR DEATHS OF RELATIVES.

Relatives of persons whose lives have been lost by reason of a collision upon the high seas are entitled to recover, under the general admiralty law, from the offending vessel damages for the loss of the society and support of their deceased relatives, and for the value of their personal effects.

Admiralty Appeal. See 17 FED. REP. 456.

John D. Rouse and Wm. Grant, for libelants, appellants.

Wm. S. Benedict and A. J. Murphy, for claimants, appellees.

PARDEE, J. This cause came on to be heard at this time upon the pleadings and evidence, and was argued by counsel, whereupon, and in consideration thereof, the court doth find the following facts:

(1) The steam-ship *E. B. Ward, Jr.*, owned by Oteri & Bro., of New Orleans, and the Swedish bark *Henrik*, were, on the twentieth day of January, 1882, in the Gulf of Mexico, about 95 miles off Cape San Antonio, Island of Cuba; the steam-ship proceeding on her voyage, under steam, in a direction south-east by south, and the bark proceeding, under sail, north by west.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

Both vessels were fully equipped, and carried the usual lights. At 9 o'clock P. M. the vessels sighted each other. The bark first saw the Ward off her port bow, first her white light, then both lights, and the only evidence produced by claimants—that of the man at the wheel of the Ward—shows that the red or port light of the Henrik was the first and only light seen by the Ward. It follows, therefore, that the Ward was approaching the Henrik across her course, when the two vessels came in sight of each other, some time before the collision. In this situation, the wheel of the Ward was put to starboard, and afterwards hard a-port, the vessel changing her course about one and one-half points under each. While the wheel was hard a-port, the Ward struck the Henrik amid-ships, sinking her in a very few minutes. The sailors mentioned in the libel (part of the crew of the Henrik) went down with her, and were drowned.

(2) The bark Henrik kept her course after she sighted the Ward, being the same course she had been sailing since 5 o'clock P. M., until the collision was inevitable, when she luffed, but was struck before she had changed her course very materially. As the wind was blowing from the east, and the sails of the Henrik were close set, the luffing had a tendency to check her speed and to prevent a collision. The master of the Ward admits that the two vessels would have come together head on, if the Henrik had not luffed. This being the case, the action of the bark was not a fault, even if an error of judgment, since it was caused by the immediate presence of a peril caused by the Ward.

(3) The Ward was running at the rate of nine miles an hour when she first saw the lights of the bark, but did not check her speed, when, according to the answer of the claimants and the conduct of her officers, there seems to have been doubt as to the true position of the bark. No attempt was made to stop, by the officers of the Ward, until after the collision actually occurred.

(4) The steam-ship E. B. Ward, Jr., was solely in fault for the collision with the Henrik,

(5) The libelants are the legal representatives of the three sailors named in the libel, who lost their lives in said collision, in manner and form as alleged in said libel.

(6) The said sailor, Carl Peterson, was born on the — day of —, 1837, and was 45 years old at the time of his death, and was earning £2 15s. per month. Gustof Leander Jonssen was born on the eighth day of April, 1860, and was 22 years old at death, and was earning £2 per month. Erick Anderson Holm was born the fifteenth day of January, 1844, and was 38 years old, and was earning £3 per month. Each of said sailors was of good moral character, industrious, and contributed to the support of libelants. Each of said sailors lost clothing and personal effects of the value of \$75, and the said Holm lost in addition his chest of tools, valued at \$480.

(7) That by the said wrongful and negligent acts of the said steamer E. B. Ward, Jr., her master and crew, the said libelant Christina Carlsdotter, widow and legal heir of Carl Peter Peterson, in the manner and means by which said Peterson came to his untimely death as heretofore found, has suffered damages for the loss of the services, society, comfort, and support of her said husband in the sum of \$2,000, and for personal effects in the sum of \$75.

(8) That by the said wrongful and negligent acts of said steamer, her master and crew, the said libelants John Gustaf Jonssen and his wife, Charlotta Jacksdotter Jonssen, surviving father and mother and sole heirs at law of said Gustaf Leander Jonssen, in the manner and means by which said Jonssen came to his untimely death as heretofore found, have suffered damages for the loss of services, society, comfort, and support of their said son in the sum of \$2,000, and for personal effects in the sum of \$75.

(9) That by the said wrongful and negligent acts of the said steam-ship, her master and crew, the said libelants Ulrika Beata Holm, mother, and Eva Maria Holm, sister, and both heirs of Erick Anderson Holm, in the manner

and means by which said Holm came to his untimely death as heretofore found, have suffered damages for the loss of services, society, comfort, and support of their said son and brother in the sum of \$2,000, and for personal effects in the sum of \$182.20.

1. I find that the steam-ship E. B. Ward, Jr., was in fault in not so changing her course, in presence of the approaching bark, as to avoid said bark, and in not reversing her engines and stopping when her officers were in doubt as to the position of the bark.

2. In my opinion the bark Henrik simply complied with the well-established rules of navigation in keeping her course until the collision became apparently inevitable; and that it was not a fault on her part to attempt to avoid the collision at the last moment, while in the presence of a danger brought about by the fault of the steam-ship.

3. Libelants, in my opinion, are entitled to recover under the general admiralty law for the loss of the society and support of their deceased relatives, and for the personal effects.

It is therefore ordered, adjudged, and decreed that the libelant Christina Carlsdotter, surviving widow of the said Carl Peter Peterson, deceased, do have and recover of the steam-ship E. B. Ward, Jr., the sum of \$2,075. That the libelants John Gustof Jonssen and his wife, Charlotta Jacksdotter Jonssen, parents of the said Gustof Leander Jonssen, deceased, do have and recover of the said steam-ship E. B. Ward, Jr., the sum of \$2,075; and that Ulrika Beata Holm, the mother, and Eva Maria Holm, the sister, of the deceased Erick Anderson Holm, do have and recover of the steam-ship E. B. Ward, Jr., the sum of \$2,182.20,—all with 5 per cent. interest on each sum from January 20, 1882, until paid, and all costs of suit. And whereas, the said steam-ship E. B. Ward, Jr., having been claimed by Salvator Oteri and Joseph Oteri, was released unto them on bond, with E. M. Stella as security: It is ordered, adjudged, and decreed that libelants respectively have judgment against the said Salvator Oteri, Joseph Oteri, and E. M. Stella, *in solido*, for the several amounts awarded as above against the said steam-ship E. B. Ward, Jr., with 5 per cent. interest per annum from January 20, 1882, until paid, and all costs of this suit. It is further ordered that execution issue in favor of each of said libelants for the amount due them respectively in due course.

KELLY and others v. OTIS.¹

(Circuit Court, E. D. Louisiana. January 30, 1885.)

SEAMEN'S WAGES—REV. ST. §§ 4577-4586.

The general maritime law, which, in a case of *seminaufragium*, or where the vessel was condemned and sold as too unseaworthy to be repaired, gave discharged seamen passage home and wages up to the time of reaching home, is modified by the statutes of the United States which provide for all cases of discharge of seamen in foreign ports, and, in case of destitute seamen, their return home, by the consular agents of the United States, at the expense of a fund derived from the one-third of the three months' extra wages collected by the consuls or agents from all American ships discharging seamen in foreign ports, except where ships are stranded or wrecked, or condemned as unfit for service. See sections 4577-4586, Rev. St.

Admiralty Appeal.

R. King Cutler and *E. D. Craig*, for libelants.

W. S. Benedict and *Ambrose Smith*, for defendant.

PARDEE, J. About December, 1882, the schooner John G. Whipple, of which the succession of Peter A. Fronty was the owner, and of which Henry Otis was the mortgagee in possession and control, sailed from this port for the port of Minatitlan, Mexico, with a cargo of lumber. With more or less trouble from leaking the voyage was made in safety, and the cargo delivered. A return cargo of mahogany timber was loaded, consigned to said Otis, and, on the 14th day of February, 1883, the said schooner sailed from said port of Minatitlan for the port of New Orleans. At the time of sailing, according to the sworn protest of the master, mate, and carpenter,—the two latter being libelants herein,—the said schooner was tight, staunch, and strong; had her cargo well and sufficiently stowed and secured; had her hatches well calked and covered; and was well and sufficiently manned, etc. On the sixteenth of February she encountered heavy head seas and storms, which so distressed her through laboring and leaking that the master, on consultation with his officers and crew, abandoned the voyage and turned back to the port of departure, which was safely reached on the seventeenth day of February. On the 17th the master appeared before the American consul and made protest, which on the 20th was extended, and was signed and sworn to by the master, mate, and carpenter. On the same day, on application of the master, the consul ordered a survey, which resulted in recommending the forthwith discharge of the cargo to ascertain the cause and extent of the leaks. After the discharge of cargo, on the first of March, the consul ordered another survey, which, on March 3d, resulted in finding as follows:

"We find five planks on each side started from her transom, main boom broken, her jib-stay parted, the after-port chain-plate broken, and the bolts loose; her seams from light-water mark to plankshire and wood ends open, causing great leaks; her water-way seams we find very much open, and there is no doubt that the seams sprung open in the sea-way, causing her to leak

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

badly; that the said vessel is badly strained and unfit for sea in her present condition, and in dilapidated condition, which would necessitate a repair, which in this port could not be had, but at an exorbitant expense which would far exceed her value when completed."

On this finding the schooner was advertised and sold, the sale taking place on March 7th, under the authority of the consul. March 8th the crew were paid off in full and discharged by the consul, but no future pay was given then, nor expense for sending them home was provided. The entire crew returned to this port at their own expense, and have brought their libel against Otis as owner, each for three months' advance pay, for \$25 expense of passage home, and for \$10 expense of board in foreign port while waiting to get passage home. In the district court their demand was rejected, because the evidence showed a condemnation and sale of the schooner within the provisions of section 4583 of the Revised Statutes of the United States, in which case no damage in the nature of extra wages or for expenses or passage money is recoverable under the law. In this court the right to recover is claimed, notwithstanding the sale and condemnation under article 4583, because the schooner was unseaworthy when she sailed from the port of New Orleans, within the knowledge of Otis, as owner, and unknown to libelants, from whom it was concealed.

The evidence in the record does not satisfactorily show that the schooner was unseaworthy when she sailed from the port of New Orleans on the voyage to Minatitlan; and such fact of unseaworthiness is entirely inconsistent with the fact that the voyage was made in safety, with the sworn protest of February 20th of two of the libelants, and with the additional fact that at Minatitlan no complaint was made by any of the crew, under section 4559 of the Revised Statutes, which provides for a survey in case of unseaworthiness in a foreign port. But, considering the fact that the schooner was old and decayed, and leaked a good deal on the voyage to Minatitlan, and was found to be dilapidated by the board of survey after her return from the attempted voyage from Minatitlan to New Orleans, I am disposed to think that she was unseaworthy when she left New Orleans. The evidence, however, entirely fails to show that Otis, the alleged owner, but really the mortgagee in possession, had any knowledge of her unseaworthiness or acted with bad faith in any respect. The libelants cannot, therefore, recover from him on any such ground. In fact, in no aspect of the case made by the evidence can I see that libelants can recover against the respondent.

Section 4583, to the effect that "no payment of extra wages shall be required upon the discharge of any seaman in cases where vessels are wrecked or stranded, or condemned as unfit for service," makes no exception in terms, and, unless we can have a case where a ship shall be condemned as unfit for service, and yet be seaworthy, it would seem to be difficult to imply or infer an exception. It would seem that no statutory right to three months' wages can exist in any

case of discharge of seamen in a foreign port, where the vessel is condemned as unfit for service. The three months' extra wages under the statute are clearly intended to be in lieu of expenses and passage money, to enable the discharged seamen to return home.

The general maritime law which, in a case of *seminaufragium*, or where the vessel was condemned and sold as too unseaworthy to be repaired, gave discharged seamen passage home, and wages up to the time of reaching home, is unquestionably affected and modified by the statutes of the United States, which provide for all cases of discharge of seamen in foreign ports, and, in case of destitute seamen, their return home by the consular agents of the United States at the expense of a fund derived from the one-third of the three months' extra wages, collected by the consul or agents from all American ships discharging seamen in foreign ports, except where ships are stranded or wrecked, or condemned as unfit for service. See sections 4577-4586, inclusive, of the Revised Statutes of the United States.

Before the statute of 1856, (11 St. at Large, 62,) where the provision, "that in cases of wrecked or stranded ships or vessels, or where vessels are condemned as unfit for service, no payment of extra wages shall be required," first appears in the laws of the United States, courts of admiralty usually followed the case of *The Dawn*, where Judge WARE, in a case like the present, denied the three months' extra wages, but allowed a sum in addition to wages sufficient to defray expenses of returning home, to be paid out of the proceeds of the sale of the vessel, (see Davies, 121, and Fland. Mar. Law, § 473;) but since the act of 1856 the cases generally deny, when the ship was condemned and unfit, both extra wages and expenses home. See *Hoffman v. Yarrington*, 1 Low. 168; *Drew v. Pope*, 2 Sawy. 72; *Gallagher v. Murray*, 10 Ben. 290.

In *Henop v. Tucker*, 2 Paine, 151, and perhaps other cases decided before the act of 1856, it is intimated that the extra wages stand upon a different footing if the ship were started on her voyage in an unseaworthy condition, and that in such case they might be recovered. While I am not disposed to concede that in any case where the ship is condemned in a foreign port as unfit for sea service, that the extra three months' wages can be recovered, I am of the opinion that, in case of fraud or bad faith on the part of the owner, a seaman discharged improperly or prematurely may recover all the damages suffered by reason of such discharge.

Entertaining these views of this case, it follows that the extra wages demanded must be refused, because the schooner was condemned in a foreign port as unfit for sea service, and the demand for expenses in returning home incurred by libelants must be rejected because no fraud nor bad faith existed on the part of Otis, considering him as the responsible owner.

Let a decree be entered affirming the decree rendered in the district court in this case, with costs against libelants.

THE PRINZ GEORG.¹BELLICI and others v. THE PRINZ GEORG.¹

(Circuit Court, E. D. Louisiana. December 25, 1884.)

1. ADMIRALTY—JOINDER OF PARTIES.

Where a thing is defendant, and several persons are asserting rights in it, distinct but before the same tribunal, the proceedings are, for certain purposes, necessarily to be considered together, *i. e.*, to rank the claims or to proportion the proceeds. S. C. 19 FED. REP. 653, affirmed.

2. THE PASSENGER ACT, 22 ST. AT LARGE, 186.

The responsibilities and duties devolving upon vessels and their masters under the passenger act of 1882 (22 St. at Large, 186) cannot be evaded by a contract of charter.

3. SAME—SECTION 4.

The penalty of three dollars *per diem* for each passenger put upon short allowance for food and water, given by the fourth section of said passenger act, constitutes a claim against the vessel, and may be enforced by proceedings *in rem*.

Admiralty Appeal.

R. King Cutler and Richard De Gray, for libelants.

E. W. Huntington, Horace L. Dufour, George H. Braughn, and Emmet D. Craig, for claimants.

PARDEE, J. The district judge decided (1) that the libelants might join their actions in one common libel; (2) that the responsibilities and duties devolving upon vessels and their masters under the passenger act of 1882 (22 St. at Large, 186) could not be evaded by a contract of charter; (3) and that the penalty of three dollars *per diem* for each passenger put on short allowance for food and water, given by the fourth section of said act, constituted a claim against the vessel, and might be enforced by proceedings *in rem*. The reasons given for thus deciding seem to be full and conclusive, and I deem it unnecessary to amplify or add to them.

The next point in this case to be determined is what said section 4 of said passenger act requires to be furnished to each passenger in the way of food, under the penalty of three dollars per day. The language of the act is:

"An allowance of good, wholesome, and proper food, with a reasonable quantity of fresh provisions, which food shall be equal in value to one and a half navy rations of the United States, and of fresh water not less than four quarts per day, shall be furnished each of such passengers. * * * If any such passengers shall at any time during the voyage be put on short allowance for food and water, the master of the vessel shall pay to each passenger three dollars for each and every day the passenger may have been put on short allowance, except in case of accidents where the captain is obliged to put the passengers on short allowance."

It has been assumed in argument that one and a half navy rations in kind are required for each passenger under this law, but I cannot assent to this view, not only because of the exact language in ques-

¹ Reported by Joseph P. Horner, Esq., of the New Orleans bar.

tion, *i. e.*, "which food shall be equal in value to one and a half navy rations," but because, considering the matter of climate and the diversity of country and habit among the many emigrant passengers coming to this country, such construction is not reasonable, and is against the interest of both emigrants and vessels. If any nice point could be raised as to the proper construction of the language quoted, it would be whether the food to be furnished was to be equal in money value or in nutritive value to one and a half navy rations, but this case hardly requires a discussion of so nice a point.

It has been further argued in this case that the failure of the master or the vessel to comply with other requirements of said section 4, "such as failing to serve three meals daily at stated hours, to furnish mothers with infants' wholesome milk, or to furnish tables and seats for passengers at regular meals, would entitle the passengers to recover the three dollars per day penalty; but, again, I think that the language of the act settles the matter, and renders it clear that such a penalty is only allowed for putting passengers on short allowance of food and water."

On the facts of the case I arrive at practically the same conclusions as the district judge. The case shows that the voyage contemplated was one of about 30 days, from Palermo to New Orleans; that the food to be furnished passengers was scheduled on the back of each ticket furnished to passengers; that of such food a supply for the voyage was taken aboard before sailing; that such supply was set apart under the charge of a *gratis* passenger cook, and, together with more or less supplies of the ship, was served with more or less regularity up to the stormy weather occurring between Gibraltar and the Bermudas; that during such stormy weather the unexhausted passengers' supplies were badly damaged; and that, from the time of the stormy weather on to this port of New Orleans, except while lying in port at Bermudas and Philadelphia, the passengers were on short allowance of provisions, as required to be furnished by the passenger act of 1882. Whether the passengers were on short allowance under the law prior to the stormy weather referred to depends upon whether the provisions scheduled on the tickets for each passenger, and supplied on the vessel was or not *equal in value* to one and a half navy rations of the United States, and of this nothing can be said positively from the evidence in the case.

It is true that the passengers grumbled and protested from the time their first sea-sickness was overcome, and that the master procured a small supply at both Escombrero and Gibraltar, and added some from the ship's stores; but I think the main and controlling facts as proved are that the quantity and quality as specified on the tickets were approved by the passengers and port authorities at Palermo before sailing, and that, in kind, they were better suited to emigrant passengers from Italy than the United States navy rations, in kind, would have been.

These facts, taken with the presumption that the master knew our law on the subject and complied with it, and the total absence of evidence of value, warrant the court in finding that the libelants' case fails on this point. While the passengers were in port at Bermudas and at Philadelphia fresh provisions were furnished, and, while they may have had other grounds of complaint, it does not seem that they can, under the evidence, complain of a short allowance of food.

The next question is how far accident obliged the captain to put the passengers on short allowance, as we have seen was the case for the latter part of the voyage. After the provisions were damaged and destroyed the ship neared the Bermudas, where the master in his protest says he was compelled to put in for repairs and to renew provisions. Up to the arrival in Bermudas, then, it is easy to point out the accidents which obliged short allowances to the passengers, but from there on no accident is alleged or proved. At the Bermudas the master knew that the 30 days originally contemplated for the voyage, and for which time the passengers had been provisioned, had expired, and he knew that the supplies originally put aboard for them had been exhausted or destroyed. It was his plain duty, therefore, to have provided at Bermudas sufficient to furnish each passenger "an allowance of good, wholesome, and proper food, with a reasonable quantity of fresh provisions, equal in value to one and a half navy rations of the United States," until his ship could reach Philadelphia; and, again, it was his duty at Philadelphia to have made like provision for the voyage from Philadelphia to this port, all of which he failed to do.

It was not accident, but neglect, of the master that put the passengers on short allowance from Bermudas to Philadelphia, and from Philadelphia to this port, and the time of such short allowance was from December 9th to December 15th, six days; and from December 26th to January 9th, 14 days,—in all making 20 days of unjustifiable short allowance, for which the three dollars per day penalty for each passenger may be allowed. All the adult passengers who have joined in this libel are clearly entitled to recover, each for him or herself, this penalty amounting to \$60 each. It seems, from the evidence, that, in contracting for passage, those over 12 years were classified as adults, and those under 12 as half, quarter, and *gratis* passengers, and fare was charged accordingly. The demands of the libel are for the penalty for all, whether adult, half, or quarter passengers. The law provides for each passenger, but cannot contemplate that infant passengers shall be furnished provisions equal in value to one and a half full navy rations. It does not provide for any half or quarter penalties, and the court would have no discretion to impose less than the full sum of three dollars per day for each infant passenger, if it should be held that the law provided a penalty for short allowance of food for such passengers.

The case is one of difficulty, and it is, perhaps, fortunate that in

this case this demand of libelants can be rejected on the evidence without committing the court to a construction of the law, further than to hold that under the law a half or quarter passenger is not entitled to have an allowance of food equal in value to one and a half navy rations, for the evidence does not show what such passengers were allowed, and the presumption in the absence of evidence is that they received all that the law required. The demands of the libel for \$100 general damages for each passenger for breach of contract of passage is not sustained by the evidence sufficiently to warrant the court in further mulcting the owners of the vessel. The six passengers who purchased tickets to San Francisco, and who were landed in this port without further transportation being furnished, have a case that the court would relieve if their demand had been put in the libel as well as in the brief of proctors, and sufficient evidence had been offered to enable the court to assess the actual damage; but the fact is that no such demand is contained in the libel.

A decree will be entered to the same effect as that of the district court: the costs of the district court and of this court on claimants' appeal to be paid by the claimants, and the costs of libelants' appeal to be paid by libelants.

THE NEW ORLEANS.¹

OTERI v. THE NEW ORLEANS.¹

(Circuit Court, E. D. Louisiana. February 25, 1885.)

1. SALVAGE SERVICE.

When a vessel at sea answers signals of distress from a steam-ship whose machinery has been disabled, and goes to her assistance, and supplies provisions, and takes an officer of the steam-ship, by request, to a place where he can summon assistance for the steam-ship, such services are salvage services.

2. SAME—DISTRIBUTION OF AWARD.

Where valuable services were rendered by the ship and her machinery, the master and crew doing only their ordinary duty, for which they were paid by the owners, on principles of salvage the men must receive a share of the reward. No amount of reward to owners and machinery will so stimulate and encourage efforts to save life and property in peril on the high seas, as will moderate rewards to masters and crews who are on hand to control the ship and machinery, and are the effective agents to set the machinery in motion.

3. SAME—SALVING SHIP UNDER CHARTER.

In this case, where a salvage award has been made to the owners of a ship and her crew, and where it was shown that at the time the salvage services were rendered the salving ship was under charter and in possession of the charterer, the court first allowed to the charterers, out of the salvage award, their actual outlay in rendering the services,—that is, for the hire of the ship, and for the pay-roll, and fuel consumed during the delay,—and divided the balance of the award equally between the charterer, the owner of the ship, and the crew. *The Alfen*, Swab. 189, and *The Waterloo*, 2 Dod. 433, distinguished.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

4. COSTS.

Where claimants have made no tender, paid no money into court, brought in no parties, and have done nothing to facilitate the cause save to admit a contract made with a salving vessel, the costs should be borne by them.

Admiralty Appeal.

W. S. Benedict, for libelants, appellants.

E. W. Huntington and *Horace L. Dufour*, for claimants, appellees.

Richard De Gray, for owners of the *Raleigh*.

PARDEE, J. The facts appear to be substantially as follows :

On the ninth of May, 1884, while the steam-ship *New Orleans* was in the Gulf of Mexico, on a voyage from New York to New Orleans, at a point about 125 miles south-east from the South Pass of the Mississippi river, her cylinder exploded, killing one of her engineers, injuring others of her crew, and rendering her motive power useless. Thereupon signals of distress for assistance were given from the *New Orleans*, which were first discovered from the bark *Ophir*, then on a voyage from Aspinwall to Pascagoula, about 12 o'clock on the night of May 9th, and in obedience thereto said bark tacked and beat towards said signal,—which was a flash-light,—and at daybreak the *New Orleans* was discovered with her signal of distress flying. As the *Ophir* approached, the master of the *New Orleans* put off from her in a ship's boat, in company with his first officer and a boat's crew, and came on board of the *Ophir*, reported the above accident to the *New Orleans*, asked for provisions, and that the *Ophir* would convey his first officer to the mouth of the Mississippi river, or to some steam-vessel going to the mouth of the Mississippi river, to summon assistance to the *New Orleans*.

Provisions were furnished by the master of the *Ophir* to the *New Orleans* to the value of \$60, and the *Ophir* cleared away for the mouth of the Mississippi in the forenoon of that day, with the first officer of the *New Orleans* on board. The wind at the time was light, and while thus proceeding, on the following morning, a steam-ship hove in sight, and then signals of distress were made on the *Ophir* to attract the steamer's attention, in obedience to which the steamer, which proved to be the *Raleigh*, bound to Honduras, came under the bark's stern and was informed of the condition of the *New Orleans*, and her latitude and longitude, and was requested to go to her assistance, which she did, while the bark continued her course to the South Pass until the night of the twelfth of May, when the first officer of the *New Orleans* was transferred to the steam pilot-boat *Underwriter*, bound to South Pass, and the *Ophir* proceeded on her way to Pascagoula.

In obedience to the above information and request, the *Raleigh* changed her course and ran to the point indicated, where she arrived in the course of four hours, and was boarded by the master from the *New Orleans*, who requested the master of the *Raleigh* to tow him to South Pass, but as they could not agree on terms, the *Raleigh*, after supplying the *New Orleans* with more provisions, proceeded on her voyage. When the *Raleigh* had arrived at a point about 10 miles distant from the *New Orleans*, she was again signaled from the *New Orleans* to go back to her, which she did. Then a contract was signed by the master of the *Raleigh*, on behalf of *her owners* and the master of the *New Orleans*, for the towing of the latter by the former, using the latter's hawser, to safe anchorage at South Pass bar, for the sum of \$5,000, which was safely done; and the *Raleigh*, after coming inside the Pass and receiving coal, again went to sea and proceeded on her voyage to Belize, Honduras.

The services so rendered by the *Ophir* and the *Raleigh* to the *New Orleans* were salvage services. See *The Hædwig*, 24 Eng. Law & Eq. 582; *The Susan*, 1 Spr. 499; *The James T. Abbott*, 2 Spr. 101; *The*

Williams, Brown, Adm. 208; *The Bolivar*, 1 Woods, 397; *The Sarah*, 3 Prob. Div. 39; *The Saragossa*, 1 Ben. 553; *The Charles Adolphe* Swab. 153; *The Reward*, 1 W. Rob. 174.

The amount to be allowed for these salvage services, if presented as a new question to the court, might require an examination into the value of the property saved, and a consideration of the circumstances under which the services were rendered; but the parties have practically settled the matter themselves. The main service was that of the *Raleigh*, and as to that the respective masters agreed and contracted before the services were rendered, and the amount of \$5,000, so fixed, is not attacked by either party as too much or too little, or as oppressive or inequitable.

The master of the *Ophir*, before suit, offered to settle for \$250. The service of the *Ophir* was incidental, and should be fixed with reference to the main amount allowed. In view of the litigation and the intervention of the crew, \$500 seems the proper compensation.

Having determined that the services were salvage services, and the amount to be awarded therefor, the next question is one of distribution. As to the sum awarded the *Ophir* there is no trouble,—one-half should go to the owners, and the other half to the master and crew, according to the pay-roll. The distribution of the sum awarded the *Raleigh* presents more difficulty. The valuable services were rendered by the ship and her machinery, the master and crew doing only their ordinary duty, for which they were paid by the owners, and yet on principles of salvage the men must receive a share of the reward. No amount of reward to owners and machinery will so stimulate and encourage efforts to save life and property in peril on the high seas as will moderate rewards to masters and crews who are on hand to control the ship and machinery, and are the effective agents to set the machinery in motion.

The next question is, who is entitled to the owner's share of the *Raleigh's* salvage? or, in other words, who were the owners of the *Raleigh* at the time the services were rendered? The libellant Oteri was the charterer of the bare ship and machinery, etc., by the day, manning, equipping, and navigating her at his own expense, carrying his own cargoes,—the owner *pro hac vice*. At the same time, the owners' property was used to some extent and was risked in the rendition of services to the New Orleans. If it were a mere question of compensation for work and labor, the owners would be entitled to nothing; but I think the case is very different, so far as it is a question of reward for the use and risk of property, and encouragement for the rendition of salvage services. Why reward a temporary owner and leave out the real owner? Neither one had really anything to say as to whether the services should or not be rendered. The case is one to be settled on principle, for we have no authorities at hand, if such cases have been adjudged in the admiralty courts.

The Alfen, Swab. 189, and *The Waterloo*, 2 Dod. 433, are not in

point; for, while they hold in terms that charterers are not entitled to salvage earned, they refer to charterers who are not in possession of and navigating the ship,—were freighters under charter-party. See Cohen, Adm. 60-63. In this case I do not understand that the contract of charter provides, either by inclusive terms or exclusive terms, as to which party to it shall be entitled to salvage money earned by the ship during the running of the charter. It seem to me that the proper rule in a case like the present is to first allow to the charterers out of the salvage award their actual outlay in rendering the services,—that is, for the hire of the ship, and for the pay-roll, and fuel consumed during the delay,—and then to divide the balance as a reward; and such rule will be followed in this case, so that from the \$5,000 awarded the Raleigh the libelant Oteri shall first be paid his actual expense in rendering the services, and the balance will be equally divided,—one-third to the charterer, one-third to the owner, and one-third to the master and crew; the last according to the pay-roll. For the purpose of distribution a reference will be ordered.

As to the costs of the case I think it clear that they should be borne by the claimants. They made no tender; they paid no money into court; they brought in no parties; they have done nothing to facilitate the cause, save to admit the contract with the Raleigh, which the court has found did not cover all the salvage service rendered; in short, they have not brought themselves within the rules applied in salvage cases in order to save themselves from costs. See Cohen, 260, 261, 288, 289; Jones, Salv. 204.

The costs of the reference in this court for apportionment among the libelants will be taxed to the owners and charterers of the Raleigh.

THE THOMAS CARROLL.

(*District Court, N. D. New York. June 5, 1885.*)

1. COLLISION—ERIE CANAL—INEVITABLE ACCIDENT—FAULT.

Where a collision occurs, on a bright starlight night, between two boats going in opposite directions at a speed of less than three miles an hour, upon the sluggish waters of a canal, it cannot be attributed to inevitable accident, and especially so, when they see each other in ample time to execute all necessary maneuvers.

2. SAME—DUTY OF BOAT IN UNUSUAL POSITION.

Where a boat is in an unusual position, where she has no right to be, she must take adequate and necessary means to inform others of the fact.

3. SAME—NEGLIGENCE.

In order to hold the injured vessel responsible, she must not only be at fault, but the fault must in some way contribute to produce the accident.

Benjamin H. Williams, for libelant.

George Clinton, for respondents.

COXE, J. On the fifth of August, 1882, the steam canal-boat Venus, with her consort Leto, was proceeding westwardly along the Erie canal. Both boats were loaded with cement. The Leto was pushed ahead of the Venus, being fastened to her by stiff iron couplings. At midnight, and when about a half of a mile west of May's point, in the county of Seneca, a collision occurred between the Leto and the steam canal-boat Thomas Carroll. It is to recover for the injuries thus sustained by the Venus and Leto that this action is brought. The Carroll was loaded with grain, and was destined for New York. She was without a consort. At the point in question the canal is about 68 feet wide, the navigable channel being about 38 feet wide. The berme bank is on the north, or right-hand side, the tow path on the south, or left-hand side, going east. The three boats were of about equal dimensions, being 96 feet in length and $17\frac{1}{2}$ feet beam.

Where a collision occurs, on a bright starlight night, between two boats, going in opposite directions, at a speed of less than three miles an hour, upon the sluggish waters of the canal, it cannot be attributed to inevitable accident, and especially so, when they see each other in ample time to execute all necessary maneuvers. Merely to state the facts is to answer the proposition in the negative. As there was no *vis major*, it necessarily follows that either the Venus and her consort, or the Carroll, or both, were at fault.

A careful examination of the evidence has failed to disclose any dereliction of duty on the part of the Venus and Leto which can fairly be said to have contributed, in any appreciable degree, to the accident. For it is quite evident that the injured vessels would not be inculpated, even though it were determined that all the accusations now brought against them, both in equipment and management, were fully supported by the proofs. It is not easy to trace any connection between the collision and the absence of inboard screens for the lights, the use of the stiff coupling, or the failure to have a lookout on the bow of the Leto. Had the screens been present and the coupling absent, had the captain stood at the exact point where, it is now asserted, he should have been, the consequences would have been the same. Nothing that the Venus and Leto reasonably could be expected to do to avert the injury was omitted. The crew exhibited as much skill and prudence as could be expected in the circumstances. Had they executed some of the maneuvers and followed some of the theories advanced upon the trial, not only would the disaster, in all probability, have been more severe, but the libellant would, in part at least, have been held responsible for it. The Venus and Leto were where they had a right to be, and where it was their duty to be. Immediately upon discovering the proximity of the Carroll, and informing her of their presence, they followed the ancient law of the sea, and put their helm a-port. They kept as close to the berme bank as possible, and were there when the blow was given.

Their engine was reversed, and speed slackened as soon as danger was apparent. They were hardly moving at the time of the collision. Every means of safety had been exhausted, and they were practically helpless. The situation in this respect was not unlike that of the injured steamer in *The Pennsylvania*, 24 How. 307, 312. Could their master have foreseen the erratic and unexpected course of the Carroll, he might have taken many additional precautions, but this he could not know. It was to him an ordinary case of two steam-boats meeting on a clear night. He assumed, and he had a right to assume, that if he kept his own side all would be well. He was not called upon to predict that the coming boat would take his water and attempt to pass him on the starboard side. From what has been said already, it follows, as an almost inevitable presumption, that the Carroll was at fault. Her negligence is, however, not left to presumption; it is clearly proved. Even upon her own theory she cannot escape. The evidence, viewing it in the best possible light for the respondents, is that the Carroll saw the Venus and Leto far enough ahead to do all that was necessary to prevent accident. She was then 19½ feet from the berme bank and 300 or 400 feet from the Leto. If, in traversing this space, she had swung 18 feet to the right, she would have passed in safety. She gave one whistle,—“Go to the right,”—which was answered by the same signal from the Venus. The libellant’s evidence regarding the signals is stoutly disputed, but it is thought that the preponderance of proof is against the respondents on this point. Moreover, the direct testimony is supported by strong presumptions. It is hardly within the realm of probability that two boats, meeting at night upon a narrow water-way, would give contrary signals, one saying, “Go to the right;” the other replying, “We cannot; we are going to the left, and you must go to the left also;” and that there the interchange of signals should cease. All agree that but one signal was given from each boat; the respondents, however, contend that the Carroll answered the one blast of the Venus by giving two. If this were true, would not so experienced a navigator of the canals as the master of the Venus have taken some notice of it, and if he failed to do so, would not common prudence have dictated to the Carroll the necessity of repeating her own signal in order that the Venus might surely understand it? Is it likely that both boats would run into inevitable danger, each knowing that the other was turning toward the berme bank, and make no further attempt to extricate themselves?

If the Carroll, as her master says, was aground, or dragging on the bottom of the canal, 19 or 20 feet from the berme bank, unable to get off, she should not have contented herself with one signal or two signals. She should have informed the Venus and Leto beyond the reach of doubt that she lay directly in their path; the path, which, in ordinary circumstances, it was their duty to take. But she did nothing of the kind. The libellant insists that the Carroll at first

turned to the right and kept upon the tow-path side until so near the Venus and Leto, that any change of the latter's course was impossible, when she suddenly took a sheer and struck the Leto, lying helpless on the berme bank. If this be the correct version she was guilty of a grave fault. If, on the contrary, as the respondents assert, she was aground on the berme bank, directly in the path of the Venus and Leto, and took no measures, except the one signal, to inform them of her extraordinary situation, she was equally culpable.

Where a boat is in an unusual position, where she ought not to be, where she has no right to be, she must take adequate and necessary means to inform others of the fact. Upon either theory, then, the Carroll was negligent, and the agreement of her master, immediately after the accident, when it was thought the injury was slight, to pay the damages incurred, is very suggestive as to what his opinion, at that time, was.

It follows that there must be a decree for the libelant, with costs, and a reference to compute the damages.

MINA v. I. & V. FLORIO S. S. Co.

(District Court, D. New Jersey. May 25, 1885.)

1. ADMIRALTY PRACTICE—MISNOMER—WAIVER—APPEARANCE AND ANSWER.

After a respondent has appeared generally, and answered upon the merits, it is too late to move for a dismissal because of a misnomer in the libel and motion.

2. CARRIERS OF GOODS BY VESSEL—BILL OF LADING—TRANSHIPMENT—DELAY—DAMAGE TO CARGO OF PRUNES.

On the twenty-third, thirtieth, and thirty-first of March, 1881, L. shipped on board respondent's three steamers 600 casks of prunes at Trieste, to be delivered in New York, unto order, and took therefor bills of lading, in which respondent stipulated that said steamers were bound for New York, and reserved the right to tranship any part of said cargo to another steamer. Two of the steamers proceeded to Palermo, Sicily, and discharged the prunes, where they remained for 55 days, when they were shipped on another of respondent's steamers, brought to New York, and delivered in a damaged condition, owing to the delay that ensued in their transhipment, and the want of proper care in their handling and storage at Palermo. *Held*, that respondent was not bound to tranship in other vessels than his own, under the bill of lading, but that he was obliged to use diligence and care that adequate facilities were furnished to comply with its agreement to tranship without unreasonable delay, and that he was liable for the damage caused by his neglect to provide for the more direct transportation of the prunes to New York after their arrival at Palermo.

Libel in rem.

Jas. K. Hill, Wing & Shoudy, for libelants.

Lorenzo Ullo, for respondents.

Nixon, J. The libel in this case is filed against a foreign company, claiming damages for negligence and want of care in the tranship-

ment of 600 casks of prunes from Trieste to New York, and praying for process against the goods and chattels of the company within this district, if the respondent could not be found. The return of the marshal on the monition shows that not finding the respondents, he attached certain property, belonging to them; to-wit: the steamship *Vicenzo Florio*, her tackle, etc., in obedience to the clause of foreign attachment contained in the process. A general appearance was entered for the respondents by Lorenzo Ullo, Esq., a claim for the property seized put in by the I. & V. Florio Steam-ship Company of Palermo, satisfactory security given, and an answer filed to the merits of the libel, acknowledging the reception and transshipment of the prunes in the attached steamer, but denying the negligence and want of care complained of. A reference was made to a commissioner to take testimony. Commissions issued to the respondents for the examination of witnesses in foreign countries, and very voluminous evidence, has been returned and filed. When the case came up for final hearing, the proctor for respondents, before the argument, moved the court to vacate the attachment and dismiss the suit, as to the respondents, on the ground of a misnomer in the libel and monition. The motion comes too late; the general appearance to the suit by the respondents and an answer upon the merits, without objection, are always regarded as a waiver of such irregularities.

Expressing no opinion respecting the action of the court, if the respondents had put in a special appearance for the purpose of entering a motion to vacate, or had filed answer, which raised the question now suggested, I have no hesitation in holding that the respondents cannot be permitted to waive such defects at the beginning of the proceedings, and afterwards urge them at the conclusion of the case.

The libel alleges that on March 23, 1881, at Trieste, one Liedmann shipped on board the steamer *Cariddi*, owned by respondents, 200 casks of prunes, to be carried from that port to the port in New York; that on the thirtieth of the same month, he shipped on the *Taormina*, another steamer of the respondents, 200 other casks of prunes, to be delivered to the port in New York; that on the thirty-first of the same month he shipped 200 other casks, on board the last-named steamer, for the same destination; that said casks were to be delivered in New York, unto order, and that the agents of the respondents at Trieste signed bills of lading therefor, in which they stipulated that the said steamers were bound to New York, and reserved the right to tranship any part of said cargo to another steamer; that the said steamers *Cariddi* and *Taormina* proceeded from Trieste to the port of Palermo, Sicily, where they discharged said prunes, and the same remained at Palermo an unreasonable length of time, to-wit, for a period of 55 days; that they were afterwards shipped upon the steamer *Vicenzo Florio*, another vessel of respondents, and brought by her to New York, and delivered to the libellant in a dam-

aged and deteriorated condition, owing to the delay which ensued in their transportation, and the want of proper care in their handling and stowage at Palermo; that the respondents neglected to transfer said prunes from Palermo for the long period above stated, although they had a number of opportunities so to do; that after their shipment Leidmann indorsed the bills of lading in blank, and forwarded them to libelant for value; that libelant is the true and lawful owner of the merchandise therein described, and by reason of the negligence and want of care and diligence of respondents in the transportation and custody of said merchandise he has sustained damages to the amount of \$6,000, which has been duly demanded, and not paid.

The I. & V. Florio Steam-ship Company of Palermo, Sicily, alleging itself to be a corporation duly organized under the laws of Italy, files its answer admitting the shipment of the prunes by Leidmann on the said steamer at Trieste, but denying that the steamers were bound for New York. The answer avers that the respondent corporation owns and manages two certain lines of steam-ships, of a different class and capacity; one of which carries merchandise along the east coast of Italy from Trieste to ports in Sicily, and back again to Trieste; and the other plies along the west coast of Italy to Palermo, in Sicily, and thence to the port of New York, and back again; and that, in the regular course of management of said two lines, all merchandise shipped on the east coast of Italy, intended to be delivered in New York, is transhipped at the port of Palermo on one of respondent's steamers bound to New York, and that such course of management is a matter of general notoriety among merchants in the ports where the steamers pass, and was also known to Leidmann, the shipper of the prunes; that when the prunes were put on respondent's steamers at Trieste, as alleged in the libel, the said Leidmann, with full knowledge of the usual mode of transportation, accepted bills of lading containing a stipulation that the respondents should have the liberty of transshipping the same upon any other of their steamers leaving the ports of Sicily for the port of New York; that the steam-ships Cariddi and Taormina proceeded, with the prunes on board, from Trieste to Palermo, where they were discharged, and remained for a certain time, awaiting an opportunity to tranship on one of the steam-ships of respondent leaving that port for New York; that they were, in fact, transhipped on the steam-ship Vincenzo Florio, one of the steamers of the respondent on the line between the ports of Italy and New York, with due dispatch, and in the proper and customary manner, and were carried to New York and duly delivered to the libelant; and that said transshipment was made without unreasonable delay and in the regular course of their business, and at the first opportunity which respondent had to forward the merchandise to the port of New York.

The bills of lading, which are made exhibits in the case, reveal the contract between the parties at the time of the shipment. From them

I learn that 600 casks were shipped at Trieste for New York on the steamers of respondent, as follows: On March 23, 1881, 200 casks on the Cariddi; on March 30th, 200 casks on the Taormina; and on March 31st, 200 other casks on the last-named steamer. That they were all shipped in good order and condition, to be delivered in the port of New York; "the liberty to tranship any part of said cargo by steamer" being reserved in the said bills of lading. The undertaking of the respondent was that the merchandise thus committed to its charge for delivery in New York would be transported there with reasonable care and dispatch,—not necessarily in the steamer selected for the voyage at Trieste, but in some steamer belonging to and under the control of the company with which the contract was made. I agree with the learned advocate for the respondent that a transshipment into steamers other than the respondent's was not in contemplation, or obligatory, under the above clause, in the bills of lading. But, nevertheless, they were obliged to use diligence and care that adequate facilities were furnished to comply with their agreement to transport without unreasonable delay.

Do the facts of the case show that the respondent performed its duty in this respect? One-third of the cargo was received by the Cariddi, at Trieste, on March 23d, and they reached Palermo on April 3d, following. The other two-thirds were shipped at Trieste, on the Taormina, on March 30th and 31st. It does not clearly appear when they arrived at Palermo, but the weight of the evidence is that it was about nine days afterwards. The only steamer of the respondent that sailed from Palermo to New York during the month of April was the Washington, which was lying at Palermo for several days, both before and after the arrival of the prunes. They were not forwarded by her to New York, and the excuse rendered is that she was already loaded when the Cariddi and Taormina arrived. I think it was the duty of the company, when they accepted the prunes and receipted for the delivery in New York, to ascertain whether they had at their command the means of their transportation within a reasonable time. If they had not, they should have declined to receive them. The Washington did not, and, it is alleged, could not, take them. Their next steamer for New York was the Vincenzo Florio, which did not leave Palermo until May 24th. In the mean time the prunes, taken from the Trieste steamers about the first of April, were kept, either in lighters or in a floating magazine, at the port of Palermo for nearly two months, awaiting the departure of another steamship. If any injury resulted to the cargo from this long detention, the loss must be chargeable to the respondent corporation, which caused it.

It should be observed, in this connection, that while the average time for a voyage from Trieste to New York, in a sailing vessel, is twice as great as is required for a steamer, the freight, or the cost of transportation, by the former is less by more than one-half than by the latter. Both methods were available in the present case, but

the steamer was selected, doubtless, on account of the promise of greater dispatch. The merchandise was delicate, and of a character to be damaged by any exposure or delay in a tropical climate. The Vincenzo Florio arrived in New York on June 11th,—about 80 days after they had been shipped at Trieste, and some weeks after they would have been regularly due if forwarded by a sailing vessel. There is no proof that the long delay was caused by any stress of weather, but it seems to have arisen from the respondent's neglect to provide for the more direct transportation of the merchandise to New York after its arrival in Palermo.

The testimony of Josiah Rich and John A. Jansen is quite explicit as to the fact and the cause of the damage to the cargo. Both had had large experience in the business, and for many years had handled the greater part of the Turkish prunes that had come into the port of New York. They agree in opinion, after a careful examination of the 600 casks, that the damaged condition of the prunes arose from the delay at Palermo in their transportation. It is a case where there should be a decree for libelant, and a reference to ascertain the damages, if the parties desire to take further evidence upon the subject.

THE SULIOTE.¹

(District Court, S. D. New York. May 8, 1885.)

1. MARITIME LIEN—SHIP'S CREDIT—CASE STATED.

The ship *S.*, belonging to American owners, arrived with cargo at Greenock, Scotland. She was a stranger there, and the captain designated C. N. & Co. as her collecting and disbursing agents, who collected the inward freights and held a large balance for the ship. It appearing that she was in need of re-metaling, C. N. & Co. ordered the necessary metal of the libelants, it being understood that the bill should be "paid by C. N. & Co. when the ship's accounts were adjusted," in cash, "under discount." Thereafter the ship remained in the vicinity for four months; but no demand for payment was ever made of the captain, and no inquiries were made of him about any of their dealings. The bill, audited by the captain, was rendered to C. N. & Co. The latter, on settling their accounts with the captain, included the bill as paid by them. After the ship had finally sailed, demands were made of C. N. & Co., but before payment they failed: and about a year after furnishing the supplies inquiries were first made after the owners. This action was thereafter brought to enforce an alleged lien upon the ship for the supplies, and, by consent, the liability of ship and owners was submitted. The judge found that the goods were not ordered or furnished on any intended credit of the ship. *Held*, that under the well-settled rule that no lien arises for a vessel's supplies except in case of necessity for the credit of the ship to obtain them, as large funds of the *S.* in the hands of C. N. & Co. were shown to have existed, which was known to the libelants, or would have become known to them on reasonable inquiry, there was no necessity for credit, and that no lien attached.

2. SAME—OWNER'S LIABILITY—PRINCIPAL AND AGENT—INQUIRY FOR RESPONSIBLE PARTY—FOREIGN PRINCIPAL.

The libelants contended that the ship's owners were liable *in personam* for the supplies. It was shown that the libelants did not know who the owners

¹Reported by R. D. & Edward G. Benedict, Esqs., of the New York bar.

were when the supplies were furnished; that they made no inquiry in regard to them until after the failure of C. N. & Co.; and that they evidently relied on the latter firm for payment. *Held*, that by the English law the credit of a foreign principal is not presumptively pledged by the dealings of an agent resident in the kingdom; that the maritime law also affords no *prima facie* presumption of authority in mere ship-brokers having funds of the ship, to bind her owners for supplies ordered by them, and there was no proof of any actual authority, that as C. N. & Co. were only agents in a limited capacity, did not know or have correspondence with the owners, and had in their hands sufficient funds of the ship, their ordering of supplies for the ship did not bind the owners by implication, and that the circumstances negated any such authority; that the libelants were bound to make inquiries of the master of the ship, or take the risk of the actual authority of C. N. & Co. Not having done so, they could not now hold the owners responsible; and the libel was dismissed.

In Admiralty.

Wingate & Cullen, for libelants.

Owen & Gray, for the Suliote.

BROWN, J. This libel *in rem* was filed to recover the sum of £283 (\$1,380) for supplies, consisting of white metal furnished in September, 1881, to the ship Suliote at Greenock, Scotland. The only question litigated is the liability of the vessel or of her owners upon the facts of the case; the parties having desired that the whole question, as respects the liability of either, should be considered and determined without reference to the form of the action.

The ship belonged to American owners. She was a stranger in Greenock, and the libelant had no knowledge of her master or owners. She arrived at that port with a cargo in August, 1881; and the master designated Clerk, Nuel & Co., of Greenock, as her collecting and disbursing agents there. They were an established firm of ship-brokers in that place, of good repute, and in good credit; and they were well known to the libelants. They collected the inward freights of the ship, amounting to about \$17,500. The vessel being in need of remetaling, Clerk, Nuel & Co., through Mr. Nuel, since deceased, ordered the necessary white metal of the libelants. They furnished it, accordingly, prior to September 13, and the old metal was returned to them and credited on account. The libelants' witnesses say that Mr. Nuel told them that he was acting as agent of the ship and had authority to make inquiries about prices; and that it was understood that the sale was made to the captain and owners; and that they gave no credit to Clerk, Nuel & Co. But it was "understood that payment would be made through Clerk, Nuel & Co. in cash, under discount, Mr. Nuel never having said anything about the ship's taking credit." No dealings were had with the captain in making the contract, nor were any inquiries made of him as to the terms of Clerk, Nuel & Co.'s authority. Both Mr. Nuel and the captain are dead. Their testimony was not procured; and there is no proof of the actual authority of Clerk, Nuel & Co., except such as is to be inferred from the circumstances of the case. It was understood at first that the bill should be paid by Clerk, Nuel & Co., "when the ship's accounts were adjusted, in cash, under discount;" that there should be a discount

of $2\frac{1}{2}$ per cent., and 1 per cent. additional if payment was made in cash, which, as I understand, might be at any time not exceeding one or two months after the sailing of the ship. This was the custom of the trade at Greenock. The bark did not sail until the seventeenth of November. On the twenty-first of September, about a week after the metal had been furnished and the bill, audited by the captain, had been rendered by the libelants to Clerk, Nuel & Co., the latter rendered to the captain of the ship their account of the debits and credits of the ship, in which the libelants' bill was included as paid; and a receipted voucher, signed by Clerk, Nuel & Co. for this bill as well as for other bills, was also returned to the captain. The account also showed a credit amounting to £2,000, which Clerk, Nuel & Co. had deposited with Baring Bros. & Co. to the credit of the ship on the tenth of September, the same week in which the libelants' supplies were furnished; and a final balance of £269, 8s., besides the amount needed to pay for the libelants' bill, was thereupon receipted for to the captain, and was paid by Clerk, Nuel & Co. upon various subsequent drafts by the captain to answer the ship's needs.

Shortly after sailing the ship met bad weather and was compelled to put back to Lamlash, 40 miles from Greenock. Her arrival was reported in the Greenock papers; and a mutiny of her crew, which led to judicial proceedings in Greenock, was also extensively commented upon. The captain finally sailed again from Lamlash on the ninth of January. During all this time the libelants had never consulted the captain in reference to the goods furnished by them, or the payment of their bill, and had never made any demand upon him. After the seventeenth of January, at some time not stated, and which does not definitely appear, requests for payment were made by the libelants of Clerk, Nuel & Co., to whom their bill had been rendered, as already stated, about the middle of September. As above observed, it "had been at first understood that they would settle the bill when the ship's accounts were adjusted." But after the ship had sailed for good they began to prevaricate, to speak of insufficient funds; and on various pretexts they put off payment, stating that they had not sufficient money, and that the owners would remit. In November following the firm failed and dissolved, and then, or shortly before, for the first time, the libelants instituted inquiries to ascertain who and where the owners were. On learning that they were in New York, the libelants forwarded to them a demand for the payment of their bill. Payment being declined, the present libel was filed on the fifth of December, 1883.

The evidence on behalf of the libelants shows that the charge upon their books was made against the "Bq. Suliote, and owners;" that it was usual at Greenock to furnish supplies on the order of ship-brokers, in the manner above stated, to be paid for, either in cash or at some time subsequent to the sailing of the vessel; but that it was "not usual in the case of a sale of goods to a foreign vessel, not known,

to permit her to depart without payment, except on the responsibility of reputable agents there;" and that in this case they did not know who or where the owners were, or anything as regards their responsibility, until their inquiries, after the failure of Clerk, Nuel & Co.

Upon the above facts I must hold that neither the vessel nor her owners are responsible for this bill.

1. It is well settled, under both the English and American law, that no maritime lien arises for supplies except in case of necessity, or apparent necessity, for the credit of the ship to obtain them. In the case of *Thomas v. Osborn*, 19 How. 22, 31, CURTIS, J., states the law on this point as follows:

"To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit to procure them. If the master has funds of his own which he ought to apply to purchase the supplies, which he is bound, by the contract of hiring, to furnish himself, and if he has funds of the owners which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists; and if the lender knows these facts, or has the means by the use of due diligence to ascertain them, then no case of apparent necessity exists to have a credit; and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel." *The Lulu*, 10 Wall. 192; *Stephenson v. The Francis*, 21 FED. REP. 715, 720.

The proofs show clearly that there was an abundance of funds available at Greenock, in the inward freights of the *Suliot*, to pay for all her repairs there, with a large surplus besides. There is no reason to suppose that there was any concealment of this fact from the libelants when the supplies were ordered. There was then no possible motive for concealment; the facts were easily ascertainable; and if the libelants did not know them, as they now testify, although I think they must have known them at the time, it was clearly their own fault in making no proper inquiry. They do not say whether they made any inquiries on this subject of Clerk, Nuel & Co. even; but do say that it was not understood "that the ship was to take credit." Material-men in a foreign port are bound to make inquiries of the master as to her need of credit, before seeking to charge the ship or her owners. Had any inquiry been made of the master with regard to the payment for these supplies, it is not to be supposed that the libelants would not have been fully informed of the ample funds which the inward freights afforded to pay for them; and that they could not, therefore, lawfully charge the ship. The master, moreover, was the only person that had any authority to bind the ship at all. In dealing with Clerk, Nuel & Co., instead of the master, the libelants must be held legally chargeable with such knowledge as a dealing with the master, and upon ordinary business inquiries of him, would have conveyed to them. The case is clearly, therefore, one in which neither the master, nor any one else at Greenock, had authority to bind the ship for supplies; because there were abundant means to pay for such supplies, and the libelants had means, by the use of ordinary dili-

gence, of ascertaining that fact. *The Lulu*, *supra*; *Insurance Co. v. Baring*, 20 Wall. 163; *The Eledona*, 2 Ben. 31, 37; *The J. F. Spencer*, 5 Ben. 151, 153; *Thacker v. Moates*, 1 Moody & R. 79; Abb. Shipp. *135.

2. Whether the respondents are liable *in personam* depends upon the law of principal and agent. For goods ordered by Clerk, Nuel & Co., the respondents cannot be held unless Clerk, Nuel & Co. had authority to charge them personally therefor; nor unless such was the intent of the transaction. In both respects I think the libelants fail to make out a satisfactory case. The libelants' contract was clearly made with Clerk, Nuel & Co.; and the latter had no more presumptive authority to pledge the personal liability of the owners than they had to bind the ship. The case is one in which the language of Dr. LUSHINGTON in the case of *The Druid*, 1 W. Rob. 391, 399, is specially applicable:

"The liability of the ship," he says, "and the responsibility of the owners in such cases are convertible terms; the ship is not liable, if the owners are not responsible; and *vice versa*, no responsibility can attach upon the owners, if the ship is exempt, and not liable to be proceeded against."

In the English law it is now well settled that resident agents, buying goods on account of foreign principals, in the absence of facts showing a contrary intention, pledge their own credit only; on the ground that, for the conveniences of trade, it is not to be supposed that any privity of contract with a foreign principal is intended in such transactions. In *Smyth v. Anderson*, 7 C. B. 33, MAULE, J., says:

"It is well known, in ordinary cases, where a merchant resident abroad buys goods here through an agent, the seller contracts with the agent, and *there is no contract or privity between him and the foreign principal*. If that question had been specifically put to the jury, there can be no doubt as to what their decision would have been."

In the case of *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 605, BLACKBURN, J., says:

"The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness, perhaps, still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known that we are justified in treating it as a matter of law, and saying that, *in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituents' credit*. Where the constituent is resident in England, the inconvenience is not so great, and we think that, *prima facie*, the authority is given, unless there is enough to show that it was not in fact given."

In the subsequent case of *Hutton v. Bulloch*, L. R. 8 Q. B. 331, 334, the same law was restated, and the decision on appeal was affirmed in the exchequer chamber, (L. R. 9 Q. B. 572,) where BRETT, J., says of the foreign merchant abroad dealing in England through an English correspondent, his agent here:

"In such cases it is now settled that it is not in ordinary course for the foreign merchant to *authorize* the English merchant to bind him to the English contract." Story, Ag. § 268; Whart. Ag. § 791. See, also, *The St. Joze Indiano*, 1 Wheat. 208.

These cases, doubtless, apply only to purchases made through established agents resident in foreign countries. They have no application to *masters* of vessels who purchase necessary supplies in foreign ports. But here the purchase was not by the *master*. The libelants had no dealings with the master, but only with established agents residing at Greenock, and in good credit there; and in that point of view, the above authorities would seem strictly applicable.

A different rule is applied as respects an undisclosed principal residing within the kingdom. In that case, payment to the agent by the principal, and great delay by the vendor, will not deprive the vendor of his remedy against the principal, if the latter has not been in any way misled by the acts of the seller himself. *Davison v. Donaldson*, 9 Q. B. Div. 623; *Irvine v. Watson* 5 Q. B. Div. 102, 414. The question of election between the liability of the agent or of the principal does not here arise. See *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Tuthill v. Wilson*, 90 N. Y. 428.

I have not been referred to any case in the federal courts of this country, nor have I found any such, in which this question is considered; though one branch of the subject was referred to in *Oelricks v. Ford*, 23 How. 64. In a number of cases in the state courts the creditor has been regarded as having a concurrent remedy against the agent, and against the foreign principal, when discovered, unless an exclusive credit was given to the agent; and that it is for the jury to determine that question from all the circumstances of the case. But the rule has no application to residents of different states in this country. *Kirkpatrick v. Stainer*, 22 Wend. 244, 254; *Taintor v. Prendergast*, 3 Hill, 72, 73; *Barry v. Page*, 10 Gray, 398; *Bray v. Kettell*, 1 Allen, 80.

But, aside from this view, all the facts of the case seem to me to show, and, as I think, any jury would find, that it was not Clerk, Nuel & Co.'s intention to buy these goods on the owners' credit at the time when the goods were ordered, and that the libelants did not understand that the goods were sold upon any credit to be given to the captain or to the ship or to the owners; but that such credit as they chose to give, was given exclusively to Clerk, Nuel & Co., notwithstanding the qualifications that the libelants now seek to make in that respect. The facts and circumstances of the case, and the conduct of the libelants at the time, must be taken to outweigh their

statements, three years afterwards, as to the particular form of their dealings with Mr. Nuel, especially as he and the captain are dead, and their version of the matter cannot be obtained. Clerk, Nuel & Co. had ample funds of the ship, and there is not the slightest probability that the libelants were not fully informed of that fact. They had easy means of knowledge, and the evidence clearly shows that they expected payment from these funds. The bark was a stranger in Greenock. She was not expected to return. The owners were unknown, and were not inquired after. The bill was rendered to Clerk, Nuel & Co.; nothing was said about any credit of the ship; demand of payment was made of them, and of them only; payment was promised, and evidently expected, out of the ship's funds in their hands; and not an inquiry, even, was ever made of the master, during the four months that he was accessible in that vicinity, about the ship, her owners, or her destination. It is incredible that any credit was, under such circumstances, given to the captain, as the libelants now assert; and if the captain was not liable, the owners are not.

As a question of intention at the time, and upon the actual facts of this case, I should feel constrained to find, as I think a jury would find, for the reasons previously stated, that Clerk, Nuel & Co. neither had, nor pretended to have, any authority to bind the vessel or her owners; that they did not intend to bind either, but themselves only; and that the libelants, in not calling for immediate payment, gave credit to Clerk, Nuel & Co. exclusively. The latter were agents of the ship for a very limited purpose. They had but a very limited authority, namely, to collect the ship's freights and to pay over the proceeds to the captain or upon his order, or else to apply them to the payment of such bills as they themselves should order for the ship on the captain's request. They were not the general agents of the owners. They did not know the owners. They had no correspondence with them, nor any previous dealings with them. The funds to pay for whatever they might order for the ship were in their own hands. Manifestly, therefore, they had no right, nor color of right, to buy anything upon the credit of the owners or of the ship. That, clearly, was not intended. To do so would be a fraud. The captain did, indeed, desire them to procure these supplies; but for the very reason that they already had the money to pay for them. That is why the captain did not make the contract. The captain audited the bill; but only to show that the work had been done, and that the bill might go to Clerk, Nuel & Co. for payment. The libelants never made any demand upon the captain for payment, and manifestly they never intended to make any demand of him; and the owners could not be liable for the bill unless the captain was liable. It is not credible that the captain ever authorized, or intended to authorize, Clerk, Nuel & Co. to procure supplies on his own credit, or on the credit of the ship or of her owners, when he had already put an excess of funds in Clerk, Nuel & Co.'s hands to pay for them, and when,

under the circumstances, he himself had no lawful authority to pledge the credit of the ship or her owners. If I give a servant \$10, and tell him to go and buy me a barrel of flour with it, the seller, knowing the facts, cannot bind me by charging me with the price of the flour and letting the servant keep the money. Such facts, known to the seller, would import a cash transaction only, and would conclusively negative any authority for a credit. If, instead of exacting payment, the seller chose to give a credit, the credit must be a credit to the servant only. Clerk, Nuel & Co. had no more authority to pledge the credit of the owners than the servant his master's in the case supposed.

The maritime law, moreover, affords no *prima facie* presumption of authority in ship brokers having funds to bind the ship, or her owners, for supplies ordered by them. They had no presumed authority beyond their actual authority. The libelants were bound at their peril to ascertain their authority through proper inquiries. Had such inquiries been made, they would have learned all the facts; and I have little doubt that all the facts were sufficiently known to the agent of the libelants that transacted this business. It is only the *master*, or ship's husband, or managing part owner, or the general agents of the owners, as in the cases of *The Patapsco*, 13 Wall. 329, and *The Ludgate Hill*, 21 FED. REP. 431, that have any general authority implied by the maritime law to bind the ship or her owners. The libelants, in dealing with Clerk, Nuel & Co., instead of with the captain, whom they never saw and of whom they made no inquiries, were therefore bound to ascertain the authority of Clerk, Nuel & Co., if they undertook to charge the ship or her owners. There were no acts, either of the captain or of the owners, that gave Clerk, Nuel & Co. any apparent authority to bind the ship or the owners, and thus operated as an equitable estoppel. There was no difficulty in making proper inquiries of the captain. When the libelants wanted their bill audited by him, in order to get payment from Clerk, Nuel & Co., they had no difficulty in getting the captain's signature. The libelants, therefore, were bound to make proper inquiries of the master, or take the risk of the actual authority of Clerk, Nuel & Co.; and this authority manifestly, as it seems to me, did not extend to bind the ship or her owners for supplies when they had in their hands the money to pay for them. I do not credit the suggestion that Clerk, Nuel & Co. intended to bind them, or that they gave any ground for such a supposition until after the bark had sailed. The libelants' testimony, carefully scrutinized, does not say that Mr. Nuel at first suggested any credit to the ship or to her owners, or any liability of either, but rather the contrary. In effect all that the libelants testify to is that they "understood the sale to be made to the captain and owners," and "solely on their credit." They do not say that Mr. Nuel pretended to have any authority to pledge the credit of the ship or of the captain or of her owners, or that he undertook to pledge their credit for these supplies. But what-

ever Mr. Nuel may have said, his assertions could not bind the absent owners. The fact that the ship had sufficient funds being known, or easily ascertainable, even the captain could not have charged the owners personally for the supplies; much less could Clerk, Nuel & Co. do so.

The bill presented to the captain to be audited was, indeed, headed, though in a way little likely to attract his attention, "Bq. Suliote and owners." But this was not until after all the goods had been supplied. The libelants, in furnishing the goods, were in no way influenced by the captain's signature; and, as I have said, it was but an audit by the captain indicating the delivery of the articles, so as to entitle the libelants to payment from Clerk, Nuel and Co. Two of the libelants' witnesses testify that "the purpose of obtaining the master's approval of the bill was to satisfy Clerk, Nuel & Co. that it was correct, so that they would pay the bill as rendered." After the death of the captain and of Mr. Nuel, and the inability to obtain their testimony, no conclusive weight can be fairly attached to such a circumstance, against the other strong implications of the case. Nor can much weight, under the circumstances of this case, be given to the form of the charge on the libelants' own books. That form would be naturally used as a means only of identifying the bill. *Beinecke v. The Secret*, 3 FED. REP. 667; *Stephenson v. The Francis*, 21 FED. REP. 722.

Notwithstanding the able and elaborate brief of the libelants' counsel, I feel constrained, therefore, to dismiss the libel, but without costs.

THE JACK JEWETT.¹

(District Court, E. D. New York. April 29, 1885.)

TUG AND TOW—NEGLIGENCE—ORDER TO START.

It was not part of the duty of a tug, which started to tow a vessel by a hawser away from a pier, to see that the vessel was ready to move, when she received the order from the ship, "All right; go ahead!" and the tug was held not responsible for damage to a lighter made fast to the ship, which could not cast loose soon enough to avoid injury from the yard of the ship.

In Admiralty.

Beebe, Wilcox & Hobbs, for libellant.

Benedict, Taft & Benedict, for claimants of the tug.

BENEDICT, J. The only question presented for decision on this occasion is whether the steam-tug Jack Jewett is responsible to the owners of the lighter Enterprise for the damages to the lighter Enterprise and her cargo, caused by the fact that the Jack Jewett started to tow

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

the ship Bengal away from a pier when the lighter Enterprise was fast to the ship by lines which could not be cast off soon enough after the ship began to move to prevent the fore-yard of the ship catching upon the lighter's mast and rigging, whereby the lighter was tipped over, and part of her cargo lost.

It is proved that the tug did not start the ship until the word, "All right; go ahead!" was given by those in command of the ship to those in charge of the tug. It is also proved that the master of the tug, when he started the ship, did not know that the lighter was alongside the ship, and that he stopped his tug as soon as informed that the lighter's mast had caught on the yards.

Upon these facts, I am of the opinion that the libelant cannot recover against the tug. It was not part of the duty attaching to those in charge of the tug to see that the ship was ready to move. The negligence which caused the damage to the lighter was either negligence of those in charge of the lighter in not moving away from the ship before the ship started, or negligence on the part of those in charge of the ship in directing the tug to start the ship when the ship was not ready to start, owing to the fact that she had a lighter alongside so situated as to be in danger of injury as soon as the ship did start.

The libel against the Jack Jewett is accordingly dismissed, and with costs.